Supreme Court, U.S.
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No. 91-3

In The

Supreme Court of the United States

October Term, 1990

RONALD O. PELLETIER, et al.,

Petitioners,

v.

GARY D. ZWEIFEL,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. After a district court has *denied* the imposition of Rule 11 sanctions against a litigant and his counsel, should a *Court of Appeals* direct imposition of potentially devastating monetary sanctions, without any hearing and without any consideration of the propriety or deterent effect of lesser sanctions?

2. When the Court of Appeals determined in this case that Rule 11 sanctions were appropriate, determined the nature of the sanction to be imposed, determined the measure of those sanctions, failed to measure the deterrent effect of any other, lesser sanction, and directed imposition of monetary penalties, did its action conflict with the direction of this Court given in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990)?

3. Did the Court of Appeals' enunciation and application of Rule 11 standards and procedures in this case concerning (1) the existence of an "improper purpose", (2) the nature of sanctions to be imposed and (3) of the measure of sanctions (compensation, not deterrence) conflict with the decisions of the Third, Fourth and Tenth Circuits as expressed in *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191 (3rd Cir., 1988), *Blue v. U.S. Dept. of the Army*, 914 F.2d 525 (4th Cir., 1990), *In re Kunstler*, 914 F.2d 505 (4th Cir., 1990), and *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir., 1990)?

4. Is it proper for a Court of Appeals to order imposition of Rule 11 sanctions when, despite a detailed fact-specific complaint, the district court merely declined to draw an inference sought by the plaintiff on a motion for summary judgment?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	Ronald O. Pelletier Herbert P. Schlanger
Respondent:	Gary D. Zweifel
Other entities with an interest:	Lokey & Bowden

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OPINIONS BELOW

The Court of Appeals' opinion ordering imposition of Rule 11 sanctions is reported at 921 F.2d 1465 (11th Cir., 1991), and is also reproduced in the appendix at App.1. The district court orders granting summary judgment to the defendant and denying imposition of Rule 11 sanctions against the plaintiff are unreported and are reproduced in the appendix to this petition at App. 144 and App. 158, respectively.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on January 29, 1991, and a timely petition for rehearing or rehearing *en banc* was denied on March 29, 1991. This petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. §1254(1).

RULE PROVISIONS INVOLVED

Rule 11, Federal Rules of Civil Procedure

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to

harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 56, Federal Rules of Civil Procedure

(b) *For Defending Party.* A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

STATEMENT OF THE CASE

This case involves the summary imposition by the Court of Appeals of sanctions which may be a Rule 11 financial "death penalty" upon petitioner and his counsel without benefit of any evidentiary hearing and with no consideration of the necessity or propriety of the Court of Appeals' summary imposition of such sanctions.

Mr. Pelletier, one of the petitioners, is a non-practicing attorney who has, over the past several years, engaged in various businesses and made various business investments. Mr. Schlanger, the other petitioner, is a sole

practitioner and is the attorney who represented Pelletier in the litigation leading to this petition.

The respondent, Mr. Zweifel, is also an attorney. He was a partner in a well-known, old-line Atlanta law firm. His firm takes a "hardball" view of litigation – characterized by its senior litigation partner as "the blood pit".[1]

In late 1984 and early 1985, Pelletier became a victim of a fraudulent scheme whose principal perpetrator was one of Zweifel's clients, Mr. C.M. Culpepper. In the course of Zweifel's representation of Culpepper and in accord with his firm's "blood pit" philosophy, Zweifel participated with Culpepper in conduct which led to the present litigation.

Pelletier (represented by Schlanger) sued Zweifel, alleging that Zweifel had knowingly participated with Culpepper, and that he had aided and abetted and counselled Culpepper, in the fraudulent scheme which cost Pelletier several hundred thousand dollars. The ultimate result of that litigation was a Court of Appeals' opinion which (*despite district court findings to the contrary,* in the face of substantial evidence presented by petitioners,[2] and without affording the petitioners the benefit of any evidentiary hearing) directed the district court to impose

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[1] H. Lokey deposition, p. 62, l.3.

[2] Space limitations prevent extensive citation to all of the evidence summarized by Pelletier and available to both the district court and the Court of Appeals which support the numerous factual assertions made in this petition. See the documents enumerated on the docket as R-4-53 and 5-54. In this petition, because of that limitation, only a few of the more central allegations concerning Zweifel's active involvement are supported by citations to the evidence.

monetary Rule 11 sanctions on them both *as compensation to Zweifel.*

Statement of the Facts

This case was the culmination of a bitter business dispute involving numerous factions which had spawned several pieces of litigation in 1985. The present case accused Zweifel, the attorney for two of the parties – Buckhead House of Travel, Inc. ("BHT") and Culpepper (the owner of 50% of its stock) – of having aided and abetted Culpepper's scheme to defraud investors and, *inter alia*, of having furthered that scheme (which involved use of the mails and the telephone), and of having counselled and participated in a bankruptcy fraud (the predicate acts giving rise to the RICO claim asserted in the complaint).

In 1983, BHT was a travel agency operating in Atlanta. There were, at that time, two shareholders – C.M. Culpepper and Mr. Leroy Langston. Prior to 1983, BHT and Culpepper had had at least four other investors at various times, none of whom made any money. The scheme, as alleged, involved Culpepper's repeated solicitation of investors with false promises in order to obtain additional working capital for BHT, while keeping control of it himself.

By 1983, Culpepper and Langston each owned 50 of the 100 outstanding shares of BHT. BHT needed – not for the first time – additional capital. Langston was dissatisfied with Culpepper's management and desired a change. During 1983, Culpepper wanted Langston out of his position in BHT but Culpepper knew that Langston would sell only if Langston thought that Culpepper was also going to sell.

Culpepper therefore resorted to trickery to get Langston to sell most of his holding to William Charles Hurst, Leon Hurst and Pelham Robinson (referred to for convenience as "the Hurst Group").[3] Culpepper convinced Langston that if Langston would sell 40 of his shares to the Hurst Group then Culpepper would do likewise and the Hurst Group would then have control of BHT and would bring in additional capital, thus satisfying Langston's concerns.

Culpepper and Langston signed an agreement obligating them each to sell his shares to the Hurst Group. Culpepper, however, never had any intention of giving up his shares and, after Langston had sold *his* stock to the Hurst Group, Culpepper reneged and refused to sell his stock.

BHT then had three shareholders – Culpepper (50%), the Hurst Group (40%) and Langston (10%). The board of directors consisted of Culpepper, Leon Hurst and his son, William Charles Hurst.[4] Culpepper was the president of BHT and Leon Hurst was a vice-president.

By 1984, Culpepper's problems with Langston were continuing and Culpepper was beginning also to have problems with the Hurst Group. In February, 1984, Culpepper retained Zweifel's firm, in part to assist Culpepper in remaining in control of BHT.[5] Zweifel's firm was

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[3] See Court of Appeals' opinion, 921 F.2d at 1471.

[4] The bylaws of BHT required a 75% vote of the board for any action to be taken, thus the Hurst Group – although having a majority of the members of the board – did not believe that it could effectively cause any action to be taken. See Court of Appeals' opinion, 921 F.2d at 1471, fn.8 and fn.9.

[5] Culpepper depo., p.21, l.19-21; Answer to Amended Complaint ¶56.

told of the fraud connected with the transaction in which Langston was tricked into selling his shares. Mr. Bowden (one of the two senior partners of the firm), upon review of the situation, stated that he

> "was not concerned about the Langstons at all; these [Hurst and Robinson] are the two niggers in the woodpile, so to speak."[6]

The attorneys of Zweifel's firm then held themselves out as attorneys not only for Culpepper, individually,[7] but – without any corporate action or authority – for BHT as well and commenced negotiations on behalf of both BHT and Culpepper with the Hurst Group. Zweifel was active in those negotiations and was being kept informed of negotiations with others. The aim of the negotiations with others was to get the Hurst Group out of BHT and to find new money for BHT.

After initial negotiations with others were unsuccessful, Culpepper commenced negotiations with Pelletier concerning the terms on which Pelletier would buy out the Hurst Group's interest.[8] Culpepper and Pelletier

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[6] Culpepper depo., p.22, l.19-25.

[7] During this time, the Hursts had a lawsuit pending against Culpepper, individually. Culpepper was being represented in his defense of that suit by Zweifel and Zweifel's firm, plaintiff's exhibit 19.

[8] Leon Hurst depo., p.14, l.22 - p.16, l.1; p.17, l.24 - p.18, l.5 (until the December 29, 1984, closing between the Hurst Group and Pelletier, all negotiations for the purchase of the Hurst Group's shares were carried on between Pelletier and Culpepper).

Much later – after discovery in this suit against Zweifel had been completed – it came to light for the first time that the

(Continued on following page)

reached an agreement concerning the managerial and financial controls which would be instituted and the circumstances under which Pelletier would invest. Pelletier then paid the Hurst Group $150,000 for their interest in BHT. Because Culpepper and BHT desperately needed working capital and, because neither BHT nor Culpepper was credit-worthy, Pelletier also signed as a guarantor of a $100,000.00 line of credit for BHT, $30,000.00 of which was immediately drawn down.

When the agreement between Pelletier and Culpepper was reduced to a written draft on January 8, 1985, Zweifel stepped in and, together with Culpepper, scuttled the deal and terminated discussions. Pelletier suddenly found himself out $150,000 (which Culpepper had induced him to pay to the Hurst Group) and at risk for the additional $30,000 drawn against the letter of credit.

Pelletier, believing he had purchased a valuable property, and Langston sued Culpepper and, derivatively on behalf of BHT, named the corporation and the Hursts (who were members of the board of directors) as nominal defendants. Pelletier was represented by the law firm of

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(Continued from previous page)

Hurst Group had made an agreement in November, 1984, to sell their BHT shares to another travel agency (Travel, Inc.), that that agreement was rescinded orally on December 1, 1984, and was finally rescinded in writing in March, 1985. See Court of Appeals' opinion, 921 F.2d at 1472-1473, for a description of that transaction.

In June of 1989, while this case was pending in the Court of Appeals, the Georgia Court of Appeals (reversing the trial court) determined that, because of this, Pelletier had never actually owned the shares which Culpepper had induced him to buy from the Hurst Group, *Pelletier v. Lokey & Bowden*, 192 Ga.App. 470, 385 S.E.2d 90 (1989).

Alston & Bird and he hired Schlanger to appear for the Hursts, with whom he had no substantive dispute at that time and who were supporting his position against Culpepper.

On January 16, the day that the suit was filed, an order consented to by all of the parties (*and executed by Zweifel* on behalf of BHT) was entered. That order required that Pelletier, Langston, the Hurst Group, and their attorneys be given access to all of the books and records of BHT. Within 24 hours, Zweifel had obstructed the expedited discovery contemplated and had violated the order by refusing the parties their right to inspect the corporate documents. A hearing was held in Superior Court the next day at which Zweifel intentionally misstated the facts to the court. Zweifel stated that he had only just discovered – after consenting to the order – that Pelletier was a competitor of BHT and that, for that reason, inspection should be denied. This was a fabrication since, at the latest, Zweifel had been informed at the January 8 meeting of Pelletier's interest in a competing travel agency and Zweifel's notes reflect that fact.[9]

Despite Zweifel's protestations, BHT, with two minor exceptions, was ordered otherwise to comply with the consent order. Again, within 24 hours, Zweifel violated the order by refusing to produce documents[10] and then again dissembled to the Superior Court about his lack of compliance.[11]

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[9] Plaintiff's Exhibit 20.

[10] Plaintiff's Exhibit 48.

[11] Plaintiff's Exhibit 60.

Zweifel then obstructed and interfered with duly authorized and convened meetings of the board of directors, refused to recognize duly authorized changes in the corporate by-laws and refused to abide by directives of the board. Zweifel continued to counsel and advise Culpepper and Zweifel and his firm, in their representation of BHT, always determined what was in BHT's best interests by following the directions of their *other* client, Culpepper,[12] to further Culpepper's interests and to frustrate those of Pelletier, Langston and the Hursts.

The board meetings went forward despite Zweifel's tactics, and the by-laws were properly changed (to remove the extraordinary majority requirement from board decisions)[13] and resolutions were properly passed: Zweifel's firm was instructed not to act on behalf of BHT and new officers were elected. Zweifel's firm, however, refused to follow the directives of the board.

Acting on Zweifel's advice, Culpepper refused to permit the newly elected officers of BHT to have access to the premises, books, records, files, or property of the company or to permit them to undertake their duties.

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[12] Handley depo., p.9, ll.15-20; p.35, ll.21-24.

Mr. Handley was Zweifel's partner and assisted in the litigation of the case.

[13] The Court of Appeals' opinion criticizes Mr. Bassett, counsel to Pelletier, for failing to recognize early on that the board of directors had the power to eliminate the extraordinary majority requirement, 921 F.2d at 1482. Inexplicably, the Court of Appeals fails to explain why Zweifel, if he were *not* conspiring with Culpepper to further Culpepper's scheme, failed (as supposed corporate counsel) to advise the board of its power to resolve the apparent deadlock.

After having been directed by the board to take no further action on behalf of BHT, Zweifel's firm and Zweifel not only continued to appear at board meetings and to litigate as though they were representing the corporation, but, later, without any corporate authority whatsoever, counselled Culpepper to spend $10,000 of BHT's funds to engage bankruptcy counsel to file a Chapter 11 petition on behalf of BHT.

On March 13, after Zweifel's firm had been discharged by the board of BHT, the Superior Court held a preliminary injunction hearing and ordered that Culpepper be removed from active management of BHT and ordered that those persons whom the board had designated (but whom Zweifel had refused to recognize) be installed. Immediately thereafter, despite the fact that Zweifel's firm and Culpepper had been discharged by the board, Culpepper – without corporate authority but with Zweifel's advice and counsel[14] – filed on behalf of BHT a petition for Chapter 11 protection, effectively staying the Superior Court's injunction and maintaining Culpepper in control of BHT.

As BHT was deteriorating in the Chapter 11 proceeding, Pelletier (who had lost a great deal of money in connection with the transactions and litigation and had incurred additional expense in dealing with the fraudulently-filed bankruptcy proceedings) brought the present suit against Zweifel. The purpose of the fraudulent scheme which Zweifel was alleged to have participated in

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[14] Zweifel depo., p.140, l.10 - p.146, l.6; Bunch depo., p.140, l.10 - p.145, l.11.

Even the Court of Appeals' opinion concedes that this would constitute bankruptcy fraud, 921 F.2d at 1497.

and to have aided and abetted was two-fold: first, to keep Culpepper in control of BHT and, second, to obtain working capital for BHT while keeping Culpepper in control of the company.

It was alleged, in essence, that Zweifel mis-used and over-stepped his role as an attorney in order to maintain Culpepper in control of BHT. When Zweifel moved for summary judgment, Pelletier responded in detail and included in his memorandum, R.4-53, an itemization of the evidence supporting each of plaintiff's contentions and refuting defendant's contentions (pp. 4-70). Pelletier also filed a 125-page Response to Defendant's Statement of Material Facts and Counter-Statement of Material Facts, R.5-54, which cited to specific evidence contradicting many of the facts relied upon by Zweifel and which also set forth, paragraph by paragraph from the complaint, the facts supporting each allegation contained in the complaint (and acknowledging where inferences were sought to be drawn).[15] The district court determined that, despite the evidence, it could not reasonably infer that Zweifel knowingly participated in Culpepper's scheme to defraud. It granted him summary judgment.

Zweifel then moved for sanctions, pursuant to Rule 11, Fed.R.Civ.P. That motion was denied because although, in "plaintiff's extremely fact specific complaint", "many of the discrete facts specifically pled in the complaint are true," Order of July 10, 1989, p. 2; App. 159.

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[15] These two documents, R.4-53 and R.5-54, were separately bound and submitted to the Court of Appeals as a "Supplement to Required Excerpts of Record".

Pelletier appealed from the grant of summary judgment; Zweifel appealed from the denial of sanctions. The Court of Appeals affirmed the summary judgment but, on Zweifel's cross-appeal, held that the district court undertook too narrow a review and should have viewed the complaint as a whole. After re-weighing and re-characterizing the evidence in a light more favorable to Zweifel (which enabled it to reach a conclusion diametrically opposed to the decision reached by the district court), the Court of Appeals reversed the denial of sanctions. It held that – despite the voluminous evidence cited by petitioner – the complaint was factually baseless, was filed for an improper purpose, and was frivolous when filed. It remanded with direction to impose sanctions under Rule 11 and further mandated what those sanctions should be – the amount Zweifel paid in fees and costs.

REASONS FOR ALLOWANCE OF THE WRIT

A. THE IMPROPER APPLICATION OF RULE 11

The Court of Appeals' decision in this case conflicts directly with this Court's decision in *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447 (1990), and with the approach taken by the Third, Fourth, Ninth and Tenth Circuits regarding the determination of the appropriateness, nature, purpose and scope of Rule 11 sanctions, *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191 (3rd Cir., 1988); *Blue v. U.S. Dept. of the Army*, 914 F.2d 525 (4th Cir., 1990); *In re Kunstler*, 914 F.2d 505 (4th Cir., 1990); *In re Yagman*, 796 F.2d 1165 (9th Cir., 1986); and *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir., 1990). It is important that this Court grant

certiorari so that the Eleventh Circuit's summary imposition of sanctions and its use of Rule 11 to punish rather than to deter does not serve to chill legitimate lawyer creativity and advocacy in that Circuit.

This Court held, in *Cooter & Gell*, that there are certain matters which should be left for a *district* court's initial determination: (1) whether there has been a violation of Rule 11; and, if so, (2) the nature and scope of an appropriate sanction. In this case, instead of remanding, the Court of Appeals undertook, *sua sponte*, to determine these issues. As this Court said:

> The issues involved in determining whether an attorney has violated Rule 11 . . . involve "fact-intensive, close calls". . . . [T]hat sanctions "shall" be imposed when a violation is found does not have any bearing on how to review the question whether the attorney's conduct violated Rule 11. . . . The district court is best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of the courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court . . . .
>
> . . . . An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts nor will it clarify the underlying principles of law.
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> *Cooter & Gell*, 110 S.Ct., at 2460

The value of appellate review following a district court's *denial* of sanctions is even more limited than it is when it reviews the grant of sanctions.

In the face of this anomalous decision, *certiorari* should be granted to define the proper, broad scope of the district court's discretion to *deny* Rule 11 sanctions and to emphasize the restricted nature of a proper appellate review of such a determination.

Since "the central purpose of Rule 11 is to deter baseless filings in the district court and thus . . . streamline the administration and procedure of the federal courts", *Cooter & Gell*, 110 S.Ct., at 2454, a district court decision *not* to impose sanctions should almost never be reversed. The Rule was enacted as a tool for use *by the district courts* to enable *them* to deal with what *they* perceive as abuses within *their* jurisdictions. Perhaps the Court of Appeals' proper role could best be described as a shield against over-zealous use of the Rule by the district courts, while the district court's use of the Rule is a sword to be used when the district court believes the litigation process has been abused. The Court of Appeals should not wield the district court's sword, nor force the district court to do so.

1. The Court of Appeals should not have made the determination that there was a Rule 11 violation

The Court of Appeals found a violation of Rule 11 on two separate grounds: first, for filing a factually baseless claim and, second, for bringing the suit for an improper purpose. In doing so, the Court of Appeals necessarily differed with the district court's determination that the complaint was well-grounded in fact, App. 159. It found, for instance, that any claim that Culpepper engaged in a

scheme to defraud was bound to fail and that the claim against Zweifel was, therefore, also doomed.[10] In reaching this conclusion, the Court of Appeals nowhere refers to the extensive evidence to the contrary cited in appellant's Supplement to Required Excerpts of Record.

a. Frivolous Filing

The Court of Appeals held that the district court applied the wrong standard of review and that it should have analyzed the complaint, and the evidence adduced to support its allegations, as a whole in determining whether there was a factual basis for filing the suit. Instead of remanding so that the district court could undertake that task, the Court of Appeals then unilaterally did so. Based on the *Court of Appeals'* selective determination of facts and inferences,[11] it then held that the suit was frivolous when filed. This is precisely what this Court in *Cooter & Gell* said an appellate court should not do, 110 S.Ct., at 2460.

If an appellate court believes that a district court abused its discretion by failing to utilize the proper standard of review, the proper course – indeed, the only available course – is to articulate the proper standard and

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[10] See, *e.g.*, Court of Appeals' opinion, 921 F.2d at 1504 ("Pelletier has failed to produce evidence of a scheme to defraud . . . ").

[11] In reaching its conclusions, the Court of Appeals drew many inferences adverse to Pelletier and his counsel and in favor of Zweifel. The Court of Appeals' factual findings were, therefore, understandably at odds with the district court's conclusion that "many of the discrete facts specifically pled in the complaint are true . . . " and that sanctions were not warranted.

return the case to the district court so that it may exercise *its* discretion so informed. If necessary, the Court of Appeals may *then* review the district court's factual findings under an "abuse of discretion" standard.[12]

Had the district court been given the opportunity to make findings, the Court of Appeals and the parties would have had the advantage of the district court's articulated reasoning and findings. The parties would then at least have had an opportunity to present evidence and to argue on appeal each of the factual conclusions reached by the district court. The Court of Appeals, based on those arguments, then could have determined whether those findings were supported by any evidence and whether they constituted an abuse of discretion. In a complex case, a Court of Appeals cannot say with certainty that there is *no* view of the facts which can be discerned by a district court supporting a decision to deny sanctions until the appellate court is aware of the content of the district court's decision. The Court of Appeals certainly cannot do so when the parties have never been given an opportunity to present evidence on the issues.

Moreover, no opportunity for review is present when, as here, an appellate panel undertakes to make a *de novo* determination of the facts. Since neither the Court of

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[12] The Court of Appeals' assertion that there is no necessity for remand, 921 F.2d at 1514, fn.87, is disingenuous. It presupposes that the Court of Appeals has been able to consider each and every possible reason, rationale, and explanation and each and every possible articulation of them which the district court could conceivably advance in support of its decision not to impose sanctions and has determined that each and every one of those would have been an abuse of discretion if advanced by the district court.

Appeals *en banc* nor this Court sits to review factual determinations, there is, as a practical matter, no appeal from the Court of Appeals' *de novo* determinations of the crucial facts concerning Pelletier and Schlanger's motive, intent, state of mind, and knowledge. The position Pelletier and Schlanger are in after this disposition illustrates the wisdom of this Court's instruction in *Cooter & Gell*, that determinations of fact, appropriateness of sanctions, and the nature and scope of any sanction should be left in the first instance to the district court, 110 S.Ct., at 2460.

In order to reach its conclusion that the suit was "frivolous" when filed, the Court of Appeals had to and did decide numerous legal issues which were neither raised nor briefed on appeal. As this Court cautioned in *Cooter & Gell*:

> . . . [A]n appellate court reviewing legal issues in the Rule 11 context would be required to determine whether, at the time the attorney filed the pleading . . . , his legal argument would have appeared plausible. Such determinations "will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process" by establishing circuit law in "a most peculiar, second-handed fashion." [citation omitted]
>
> *Cooter & Gell*, 110 S.Ct., at 2460

That is what has happened in this case. The Court of Appeals made rulings on legal issues concerning a number of matters which were not decided by the district court and which were neither briefed nor argued on appeal.[13] The Court of Appeals even reached out to

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[13] *E.g.*, that Pelletier's agreement with Culpepper was legally unenforceable, 921 F.2d at 1503, despite part

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decide issues presented (but not decided) in a *different* lawsuit – Pelletier's state court action against Lokey & Bowden, 921 F.2d at 1491, fn.60.

In addition, the Court of Appeals made numerous factual determinations which were either unsupported by the record, or required inferences to be drawn adverse to Pelletier, or were contradicted by evidence in the record. Each of these inappropriate, unwarranted factual determinations was contradicted by evidence which had been presented by petitioner to the district court and which was *part of the record on appeal*. See, *e.g.* 921 F.2d at:

> p.1498: "We hold that Pelletier would be incapable of proving at trial that the alleged bankruptcy fraud proximately caused him injury.";[14]
>
> p.1503: "After reviewing the evidence, we conclude that [Culpepper lacked the requisite criminal intent]: Pelletier convinced Culpepper that only Culpepper's signature on a contract

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performance (Pelletier's securing a line of credit for BHT); that his claim against Zweifel was barred by *res judicata*, 921 F.2d at 1500-02, though the suit was not pled as an affirmative defense; that Pelletier could not possibly have been damaged by the unlawful filing of the bankruptcy petition for BHT, 921 F.2d at 1498 (Pelletier's subsequent decision to permit BHT to continue to remain in bankruptcy (in an attempt to mitigate his damages and preserve what he could, at that point, of BHT's business and assets) does nothing to detract from the significance of the bankruptcy fraud itself and the added expenses incurred by Pelletier because of it); that, under state law, corporate counsel to a closely-held corporation owed no duty to the shareholders, 921 F.2d at 1491-92, fn.60.

[14] This question was neither raised by the defendant nor decided by the district court on defendant's motion for summary judgment.

would trigger Pelletier's purchase of the Hurst Group's stock. Zweifel, therefore, could not have participated in a scheme to defraud – there simply was no scheme.";

p.1504: "Culpepper never intended to induce Pelletier to act . . . "

"Pelletier and Culpepper . . . must have realized that any oral promises . . . were unenforceable."

"Culpepper believed that negotiations would continue, and that if the final draft agreement prepared by Conner was suitable, he would sign it.";

p.1505: "The record discloses that Zweifel did not know prior to the January 8 meeting in Conner's office that Pelletier already had purchased the Hurst Group's stock.";[15]

p.1506: "Zweifel's actions in the bankruptcy proceedings bolster his claim that he acted in good faith.";

"Assuming that Culpepper had devised a scheme as described by Pelletier, the evidence clearly shows that Zweifel was doing everything possible to ensure its failure.";

p.1507: " . . . according to Pelletier, he would not have purchased the Hurst Group's stock 'without such promises and guarantees [of certain financial and managerial controls].' Pelletier alleges that Zweifel counseled Culpepper to make such a promise. Furthermore, he alleges that he would not have purchased the stock had he known the extent of the Hurst Group's misappropriation of funds from the company – a fact well known by Zweifel at the time Pelletier purchased the stock. *On their face, these allegations seem reasonable and, if true, would likely satisfy section 1964(c)'s proximate cause requirement.*

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[15] But Zweifel's notes indicate that he *did* know this prior to the meeting.

> *Unfortunately for Pelletier, they are not true.*" (emphasis supplied);
>
> p.1508: "Pelletier must have realized that his oral understanding with Culpepper was unenforceable.";
>
> "Pelletier went into this transaction with his eyes wide open: he took a chance that did not pay off.";
>
> p.1509: "He [Pelletier] did not rely on the alleged misrepresentations and therefore cannot claim that his injury was proximately caused by Culpepper's fraudulent scheme.";
>
> "Obviously, Pelletier based his estimate of the company's value *solely* on the amount of sales it had been generating. He did not care that the owners had been draining funds from the company through the company's expense accounts."

This Court should grant *certiorari* to correct the conflict created by the Court of Appeals' decision with the holding of this Court in *Cooter & Gell* as to the proper role of the Court of Appeals in deciding legal issues and reweighing the evidence to determine whether Rule 11 sanctions are warranted.

b. Bad faith and improper purpose

The Court of Appeals, having determined in its opinion that there was no factual basis for the complaint, ruled that, *ipso facto*, the suit must have been brought for an "improper purpose" and was, therefore, prosecuted in "bad faith", 921 F.2d at 1520-21. The operative phrase contained in Rule 11 is:

> that [the pleading] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

The Court of Appeals concluded that a "frivolous" suit is necessarily one which is brought "to harass" and is therefore brought within the language of this section. This conclusion is at odds with the language and purpose of the Rule and with interpretive decisions in other Circuits.

The phrase "improper purpose", when properly construed, must relate to something *other* than the normal litigation process and its aim of making a plaintiff whole. For the filing of a complaint to be for an "improper purpose" it must be filed for reasons "such as to harass", and harassment must be something more than simply seeking compensation for a wrong.[16]

As the Fourth Circuit said in *In re Kunstler*, 814 F.2d at 518-19:

> . . . [W]e urge district courts to exercise special caution when evaluating a signer's purpose under Rule 11. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purposes as well as failure to comply with the first two prongs of Rule 11.
>
> *In re Kunstler*, 914 F.2d at 520.

The Eleventh Circuit, however, ignored this caution and found that an "improper purpose" was present without benefit of any evidence or hearing on the issue.[17] This

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[16] For example, the Court of Appeals said, without providing any opportunity for explanation or response, that petitioner's counsel *knew* from the start that Pelletier's claims were frivolous." 921 F.2d, at 1520.

[17] An improper purpose might be evidenced by the tactics used in the litigation, *e.g.*, conduct which is dilatory or which

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Court should grant *certiorari* to clarify the meaning of the phrase "improper purpose" and restrict its use accordingly.

2. The Court of Appeals should not have determined the nature of appropriate sanctions

The determination of the *nature* of an appropriate sanction to achieve the purposes of Rule 11 is separate from the determination that some sanction should be imposed. It depends in part on a court's knowledge of the practices within its district, as well as the litigation practices of the particular attorney involved, his reputation, and all of the surrounding circumstances.

It depends also on the district court's determination, given its knowledge of the nature of the practice in its district, of what sanction will be sufficient to deter, both generally and in a specific case, future conduct violative of Rule 11. The Court of Appeals' opinion gives the district court no opportunity to consider, much less to pass on, these matters.

Not only is the district court "best acquainted with the local bar's litigation practices", *Cooter & Gell*, 110 S.Ct., at 2460, it is best acquainted with the individual members of its bar who practice before it. What may be

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occasions unnecessary expense (such as discovery abuse), or might be shown by extrinsic evidence demonstrating a purpose other than the seeking of compensation, *e.g.*, to generate publicity, or to bring pressure to accede to terms in a transaction unrelated to the litigation, to gain competitive advantage, or to vent personal malice. Compare, *In re Kunstler*, 914 F.2d at 519-520. There is no evidence of any such conduct or purpose in this case.

an appropriate sanction for an attorney who makes a habit of filing "borderline" lawsuits may not be appropriate for an attorney who has demonstrated a history of careful, well-prepared pleading and practice before the court. While a private reprimand may be sufficient to deter future violations by one attorney, it might be totally insufficient for another.[18]

These are determinations which can be made only by a court in which these attorneys litigate and which is familiar with the litigation practices of those attorneys. Only the district court possesses this knowledge; the Court of Appeals does not and, given the nature of its work and of the practice before it, it has no opportunity to acquire it.

Certiorari should be granted to acknowledge the proper role and function of the district court in applying its unique knowledge to the determination of the nature of an appropriate sanction as contemplated by *Cooter & Gell*.

3. The Court of Appeals should not have determined the scope of the appropriate sanction

Compensation is not the appropriate measure of a proper sanction. An appropriate sanction must be sufficient only to deter conduct violative of Rule 11.[19] The

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[18] *See, e.g., Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir., 1988).

[19] *See, e.g., Doering*, 857 F.2d, at 194 ("A district court's choice of deterrent is 'appropriate when it is the *minimum* that will serve to *adequately* deter the undesirable behavior.' ") and the cases and authorities cited therein; *White v. General Motors*, 908 F.2d 675, 684-85 (10th Cir., 1990) ("[T]he primary purpose

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Court of Appeals chose compensation, however, 921 F.2d at 1522, and this choice conflicts with the reading given to Rule 11 by every other Court of Appeals which has considered the issue. *Certiorari* should be granted to insure that the scope of a sanction is reasonably related to the purpose of the Rule – deterrence – and that the Rule is not transformed into a *de facto* compensatory device.

A determination of whether a sanction will be an effective deterrent cannot be made without a factual determination – both as to the specific circumstances of those involved (individual deterrence) and the impact any specific sanction will have on other members of the Bar (general deterrence). This requires, at the least, a factual evaluation and determination (if monetary sanctions are deemed appropriate) of an ability to pay (since Rule 11 was not intended to impoverish attorneys and litigants, or to drive them into bankruptcy, but only to

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of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. *It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice.*" [emphasis supplied]); *In re Kunstler*, 914 F.2d 505, 522 (4th Cir., 1990) ("[T]he least severe sanction adequate to serve the purposes of Rule 11 should be imposed. . . . It is clear that Rule 11 should not blindly be used to shift fees." [citation omitted]); *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 201-202 (9th Cir., 1988) ("The district court considered that although the full amounts appeared to be reasonable, a lesser amount was sufficient to get the attention of Meridian and deter it from further abuses. The imposition of sanctions was well within the sound discretion of the district court.").

deter specific conduct) and of the sanction's effect on the attorney's continued ability to practice.[20]

Certiorari should be granted to confirm and reiterate the principles expressed in *dictum* in *Cooter & Gell* that the application of Rule 11 requires a recognition of each district court's unique knowledge of the practices of its Bar, and of its practitioners, and that the district court has considerable latitude to determine what sanctions would be effective in deterring violations of Rule 11 under the circumstances of each case and, overall, for cases brought within its own jurisdiction.

B. THE IMPOSITION OF SANCTIONS IN THIS SITUATION SERVES TO CHILL ZEALOUS AND EFFECTIVE ADVOCACY

When, in the face of the voluminous evidence of a fraudulent scheme and of a lawyer's participation in it, a Court of Appeals determines that suit never should have been brought and directs the imposition of possibly devastating[21] Rule 11 sanctions, its decision does *not* serve to protect the integrity of the federal judicial system. Rather, it is essentially punitive and raises a red flag, warning other attorneys not to utilize for their clients any of the more controversial tools provided by Congress for redressing wrongs. This was never an intended purpose

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[20] While a $5,000.00 sanction might be a "slap on the wrist" to a financially successful partner in a major law firm, the same sanction might be totally destructive if imposed on a sole practitioner with a financially marginal practice. *See, e.g., Doering*, 857 F.2d at 194-197 (3rd Cir., 1988); *In re Yagman*, 796 F.2d at 1185.

[21] Defendant is seeking over $280,000 in sanctions.

of Rule 11 and *certiorari* should be granted to insure that it does not become one now.

Whatever judicial antipathy toward RICO (because of its vagueness or breadth) may exist, that aversion is not a sufficient reason to punish attorneys who resort to use of the statute in the face of the kind of conduct engaged in by the defendant in this case. The starting point for analyzing whether *this* defendant was properly named as a defendant is his commission of one of the predicate acts which is *not* vague and which even the Court of Appeals' sympathetic treatment of Zweifel could not avoid: his participation in a bankruptcy fraud; see, 921 F.2d at 1497.[22]

With the concession that Zweifel had committed a bankruptcy fraud as the ultimate predicate act, and knowing how Zweifel:

> (1) had (without corporate authority) assisted Culpepper in securing a replacement stock certificate in connection with the fraud perpetrated on Langston in 1983, and
>
> (2) had manipulated his unauthorized representation of BHT during the 1985 litigation to further Culpepper's interests, and
>
> (3) had failed properly to advise the BHT board of directors of applicable law when his silence served to further Culpepper's interests, and

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[22] The Court of Appeals held that despite Zweifel's participation in a bankruptcy fraud, Pelletier *could not have* suffered any injury from this fraud. If, *as alleged*, the filing of the BHT bankruptcy was part of the fraudulent scheme to keep Culpepper in control of BHT, then when Pelletier had to incur *any* additional attorneys' fees and costs because of that filing, he had been damaged by a predicate act.

> (4) had willfully disobeyed directives of the board of directors when it served Culpepper's interests, and
>
> (5) had made false statements to court and counsel when it served Culpepper's interests, and
>
> (6) against the background of Culpepper's having induced Pelletier (with promises of management and financial reforms and controls in BHT) to purchase the Hurst Group's BHT stock and having induced him to sign a letter of credit for BHT in 1984 as part of that transaction, *and then having broken off discussions* about the promised management and financial reforms when Zweifel appeared on the scene in January, 1985,

how could the Court of Appeals, without an evidentiary hearing or even references to the evidence in the record, conclude as a matter of law that the claims were "frivolous," brought in bad faith, and for an improper purpose? If anything, the portions of the record ignored by the Court of Appeals supported a contrary conclusion. At a minimum, they supported the trial court's decision to deny Rule 11 sanctions.

Even if Pelletier and Schlanger were wrong, and Zweifel were completely innocent of any participation in the fraudulent scheme, a suit based on those facts is *not* a suit which warrants Rule 11 sanctions. The district court recognized this and denied the motion for sanctions. The Court of Appeals should have affirmed. As the Advisory Committee notes state:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight . . . .

Here, given these egregious facts and the law as it existed when suit was filed, many attorneys would have "reasonably" concluded, as did Pelletier and Schlanger, that a claim for relief under the RICO Act could be stated and many attorneys would have "reasonably" concluded that a jury might well grant relief under the RICO Act based on these facts.

There was nothing "frivolous" or "baseless" about the claim asserted nor could it reasonably be said to have been brought "in bad faith". The Court of Appeals' summary direction to impose sanctions in this case will inevitably "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories".

Certiorari should be granted to restrict the use of Rule 11 to its proper purpose and to insure that it is not used as a weapon to discourage the filing of factually and legally plausible suits.

C. THE MERE GRANT OF SUMMARY JUDGMENT DOES NOT WARRANT IMPOSITION OF RULE 11 SANCTIONS

Rule 11 sanctions should not be imposed where significant facts are, at the least, arguably in dispute. It cannot be the rule that a grant of summary judgment implies a sanctionable lack of factual basis. The mere fact that the trial judge decided the motion adversely to petitioner did not cause the trial court to impose Rule 11 sanctions and did not warrant their imposition by the Court of Appeals.

The district court decided Zweifel's summary judgment motion by determining that it was unreasonable to infer from the evidence that Zweifel knowingly participated in a scheme to defraud. The district court did not,

however, explain why it believed the inference was unreasonable in light of the evidence presented.

The Court of Appeals went one step further and, in affirming the district court's grant of summary judgment, viewed many of the crucial facts in a light most favorable to Zweifel, the moving party, rather than Pelletier (who was opposing the motion). Viewing the facts in *that* light, the Court of Appeals naturally found that there was *no* scheme to defraud and that Pelletier could, therefore, not prevail.

Fraud is often subtle and difficult to prove with direct evidence; its existence is often a matter of inference. As the Court of Appeals of Georgia recently observed:

> The most successful fraud, and the most dangerous, is that which even when held up to light can be turned in such a way as to cast a flattering shadow. . . . We did not say [in our opinion] that [the appellant] committed a fraud, but we have no hesitation in saying that the underlying facts found by the trial court make out a case for at least constructive fraud, perhaps the more so because it seems so hard to detect.
>
> *Liniado v. Alexander*, ___ Ga.App. ___, ___ (1991), on motion for rehearing.

A determination of whether an individual knowingly participated in, or aided and abetted, a fraudulent scheme is often even more difficult to demonstrate directly.

The Court of Appeals failed to explain why Zweifel's willful participation in a bankruptcy fraud is not evidence of his "knowing participation" in the scheme. The Court of Appeals failed to explain why Zweifel's assistance to Culpepper in obtaining a replacement stock certificate following the swindle perpetrated on Langston in

1983 was not evidence of his "knowing participation" in the scheme. The Court of Appeals failed to explain why Zweifel's failure to advise the board of directors of their power to break the apparent deadlock was not evidence of his "knowing participation" in the scheme. The Court of Appeals failed to explain why Zweifel's contumacious actions in the light of numerous board resolutions was not evidence of his "knowing participation" in the scheme.

Certiorari should be granted to insure that mere loss by a plaintiff of a summary judgment motion is not grounds for the imposition of Rule 11 sanctions.

CONCLUSION

For all of the foregoing reasons, this Court should grant *certiorari*, vacate the Court of Appeals opinion, reverse the Court of Appeals' order mandating imposition of Rule 11 sanctions, and remand the case to the district court for further proceedings.

Respectfully submitted,

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Appendix

1. Opinion of the Court of Appeals for the Eleventh Circuit, January 29, 1991..... App. 1

2. Order of the Court of Appeals Denying Rehearing.....App. 142

3. Order of the District Court on Motion for Summary Judgment..... App. 144

4. Order of the District Court on Motion for Sanctions.....App. 158

5. Order of the District Court of January 9, 1987.....App. 161

6. Order of the District Court of January 6, 1988..... App. 167

Ronald O. PELLETIER,

Plaintiff-Appellant,

v.

Gary D. ZWEIFEL, Defendant-Appellee.

Ronald O. PELLETIER,

Plaintiff-Appellee,

v.

Gary D. ZWEIFEL,
Defendant-Appellant.

Nos. 89-8334, 89-8667.

United States Court of Appeals,
Eleventh Circuit.

Jan. 29, 1991.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

TJOFLAT, Chief Judge:

Rule 11[1] of the Federal Rules of Civil Procedure requires district courts to sanction attorneys and the parties they are representing when they prosecute baseless claims. The sanction must be appropriate and may include "the reasonable expenses incurred" because of the prosecution, such as a reasonable attorney's fee. When a party prosecutes a frivolous appeal, Rule 38[2] of the Federal Rules of Appellate Procedure authorizes the

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[1] For the text of Rule 11, *see infra*, slip op. p. 1655, p. ___.

[2] For the text of Rule 38, *see infra*, slip op. p. 1666, p. ___.

court of appeals to award the appellee "just damages and single or double costs."

In this case, Ronald O. Pelletier and his attorney, Herbert P. Schlanger, prosecuted a baseless set of claims against Gary D. Zweifel in the district court. The court rejected Pelletier's claims; it dismissed some of them by granting Zweifel's motion to dismiss for failure to state a claim for relief and the remainder by granting Zweifel's motion for summary judgment. After the district court disposed of all of Pelletier's claims, Zweifel moved the court, pursuant to Rule 11, to impose sanctions on the ground that the claims they made against him were baseless and had been brought in bad faith. The court denied his motion.

Pelletier now appeals. He contends that the district court erred in dismissing some of his claims and, with respect to other claims, in granting Zweifel summary judgment; according to Pelletier, these claims are well founded in the law, and have sufficient factual support to withstand summary disposition. Zweifel also appeals.[3] He contends that the district court abused its discretion in refusing to sanction Pelletier and Schlanger under Rule 11.

We affirm that district court's orders of dismissal and of summary judgment. We reverse, however, the district court's order denying Zweifel Rule 11 relief. The claims Pelletier and Schlanger brought against Zweifel are baseless and, moreover, were prosecuted in bad faith. We

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[3] For purposes of convenience, we have consolidated these appeals.

accordingly remand the case for the imposition of such sanctions as well recompense Zweifel for the expenses that he incurred, including attorney's fees, in defending this suit in the district court. The appeal Pelletier and Schlanger brought to this court is frivolous. Therefore, pursuant to Rule 38, we award Zweifel double costs and attorney's fees, which shall be assessed by the district court on remand, when it imposes the Rule 11 sanctions.

We organize this opinion as follows. In part I, we set forth the facts, reading Pelletier's complaint[4] in the light most favorable to him, with respect to the claims dismissed under Fed.R.Civ.P. 12(b)(6), and giving him the benefit of every reasonable inference, with respect to the claims disposed of on summary judgment under Fed.R.Civ.P. 56. In part II, we address the merits of the claims the district court rejected on summary judgment, demonstrating that those claims are indeed baseless. In part III, we address the claims that Pelletier contends the district court should not have dismissed for failure to state a claim for relief, demonstrating that they are likewise baseless. In part IV, we consider the Rule 11 issues, concluding that Pelletier and Schlanger prosecuted Pelletier's claims in bad faith. In part V, we address the Rule 38 issues, concluding that Pelletier's appeal is frivolous.

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[4] Pelletier filed two complaints, an original complaint and an amended complaint. As we discuss *infra*, the district court did not address the merits of the original complaint.

I.

A. *Introduction.*

The controversy before us began as a contest over the control of a travel agency in Atlantic, Georgia, Buckhead House of Travel, Inc. (House of Travel). The contest was between Ronald O. Pelletier and C.M. Culpepper. Pelletier, who claimed a 40% ownership in House of Travel's common stock, sought to obtain control over the company's finances and day-to-day affairs from Culpepper, who had founded the company and held 50% of its stock. Pelletier took the contest to the courts, suing Culpepper in both the state and federal courts in Atlanta. When House of Travel went into chapter 11 bankruptcy proceedings, Pelletier sold his interest in the company and dismissed his suits against Culpepper. The sale did not make Pelletier whole; the price he received for his House of Travel interest did not fully compensate him for the price he had paid for it and the cost of his litigation with Culpepper. He thus looked elsewhere for relief, and decided to sue House of Travel's (and, for a time, Culpepper's) lawyer, Gary D. Zweifel, and his law firm, Lokey & Bowden. He brought two suits: one in state court against Zweifel and Lokey & Bowden, the other – the instant case against Zweifel alone – in federal court.

Culpepper founded House of Travel in 1970. Soon thereafter he acquired a partner, Leroy Langston, an attorney; each owned 50% of the company's 100 shares of common stock.[5] House of Travel prospered under

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[5] Langston's wife, Emily, held an interest in his shares. In this opinion, however, we treat Leroy Langston as the sole owner of the shares.

Culpepper's and Langston's ownership, but their relationship eventually deteriorated. We focus in this appeal on what transpired after Culpepper and Langston decided to part company. First, we describe a stock transaction involving Culpepper, Langston, and William Charles Hurst, Leon Hurst and Pelham Robinson (collectively, the Hurst Group) in which the Hurst Group acquired 80% of Langston's House of Travel shares. Next, we examine the Hurst Group's sale of these shares first to Travel, Incorporated and then (while Travel, Incorporated still owned the shares) to Pelletier. Finally, we focus on Pelletier's sale of the same shares of Elite Travel, Inc. Each of these transactions produced bitter litigation in state and federal court and, ultimately, the case at hand.

B. *The Culpepper-Langston-Hurst Group Transaction.*

On October 7, 1983, Culpepper and Langston entered into a written stock purchase agreement with the Hurst Group, pursuant to which Culpepper and Langston would each sell the Hurst Group 80% of their House of Travel shares for $32,000. The agreement set a closing date of October 14, 1983.

On October 14, the Hurst Group tendered payment (in the form of cash and a note to be secured by a pledge of the stock it would be receiving from Langston) to Langston; he accepted the payment and transferred 40 of his House of Travel shares to William Charles Hurst, who received the shares and held them in his name for the benefit of the Hurst Group. When the Hurst Group tendered payment to Culpepper, however, Culpepper refused to sell. Culpepper maintained that he and the

Hurst Group had secretly agreed that his promise to sell his shares would not be enforced – the promise would be used only to induce Langston to sell his shares.

Culpepper stood his ground, and the Hurst Group decided, for the time being at least, to work with him in the effort to make House of Travel prosper. The two Hursts joined Culpepper on the company's board of directors, which had three members,[6] and agreed that Culpepper would continue to serve as president of the company. William Charles Hurst became the company's vice president and Leon Hurst its secretary and treasurer.[7]

Under House of Travel's bylaws, it took a unanimous vote of the company's directors before the board of directors could act.[8] The Hursts believed that Georgia law precluded the board from changing this requirement,[9]

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[6] House of Travel's bylaws provided: "The number of Directors of the Corporation shall be a minimum of three (3) and a maximum of ten (10), the exact number to be determined from time to time by resolution of the shareholders entitled to vote."

[7] Pelham Robinson, the third member of the Hurst Group, became one of the firm's principal salesmen.

[8] The bylaws provided that 75% of the directors had to agree for the board to act. There being three directors – Culpepper and the two Hursts – the 75% supermajority requirement could not be met unless all three agreed.

[9] The Hursts were mistaken; Georgia law permitted the board of directors of a corporation, by a majority vote of all of the directors, to change a supermajority voting requirement to a simple majority voting requirement. *See* Ga. Code Ann. § 14-2-1022(a)(2) (1989). *See infra*, slip op. pp. 1617-1618, pp. ___-___.

and therefore made no attempt to use their numerical advantage on the board to manage the company through the board of directors. As a result, Culpepper used his authority as president to dictate the day-to-day operations of the company. This arrangement, however, did little to enhance House of Travel's profitability. Although the sales volume and daily cash flow steadily increased, the company's operating expenses and need for ready cash increased further. This problem was caused, in part, by the manner in which Culpepper and the Hurst Group dealt with the company's funds; they repeatedly diverted such funds to their own personal use. In addition, Culpepper, as the firm's president, paid himself a handsome salary (given the volume of business he generated) and overpaid his wife and son, who were part-time workers. This practice of using company funds for personal expenditures became a source of strife and, eventually, even criminal accusation: Culpepper accused the members of the Hurst Group of embezzling company funds; they replied in kind.

C. *The Hurst Group-Travel, Incorporated Transaction.*

By fall of 1984, the Hurst Group wanted out and was actively seeking a buyer for its House of Travel shares. It soon found one – Travel, Incorporated (TI). On November 1, 1984, Wil Brown, TI's president, signed a stock sale and consulting agreement with William Charles Hurst, Leon Hurst, and Pelham Robinson. Brown paid William Charles Hurst $5000 to convey the Hurst Group's shares to TI. William Charles Hurst could not find the Group's stock certificate, so he executed an assignment separate

from certificate and promised to give TI any documents that would substantiate his ownership. He further agreed that in the event he found the certificate, he would transfer it to TI immediately. TI also paid Leon Hurst and Robinson $47,500 each for management, promotion, and marketing services they promised to give to TI.

The contract bound the Hurst Group to seek the specific enforcement of its October 7, 1983 stock purchase agreement with Culpepper, wherein he promised to sell the Hurst Group 40 of his House of Travel shares. If the Hurst Group succeeded in acquiring these shares from Culpepper, it would transfer them to TI for the price it paid Culpepper, thus making TI the owner of 80% of House of Travel's stock.[10] The Hurst Group and TI did not want Culpepper to know of their agreement, and the Hurst Group acted accordingly; it did nothing that would indicate to Culpepper that it had sold its stock. In fact, it took steps to gain control of the company. On November 9, 1984, the Hurst Group, carrying out its contractual obligation to TI, brought suit against Culpepper in the Superior Court of Fulton County, Georgia, seeking the specific performance of its October 7, 1983 agreement with Culpepper.[11]

When TI purchased the Hurst Group's stock, it insisted on the right to rescind the purchase at its sole and

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[10] Of the remaining 20% of House of Travel's stock, Culpepper and Langston would each own 10%.

[11] As we point out *infra*, that suit was still pending on December 29, 1984, when Pelletier purported to purchase from the Hurst Group the shares it had sold to TI.

unfettered discretion. Accordingly, its agreement with the Hurst Group contained the following condition subsequent: TI could rescind the agreement within 180 days if it determined, in its discretion, that it would not be able to acquire Culpepper's shares either directly from him or through the Hurst Group's suit for specific performance of the October 7, 1983 contract. TI simply would give Leon Hurst and Robinson written notice of its decision to rescind and tender an assignment of the shares. Leon Hurst and Robinson executed a promissory note that would obligate them to pay TI $95,000 if TI rescinded, and Leon Hurst secured the note by deeding TI a tract of land in Spalding County, Georgia.[12] William Charles Hurst executed a separate $5000 promissory note that was payable upon rescission and secured by a pledge of the House of Travel shares TI would return to the Hurst Group, or their proceeds. On December 1, 1984, a month after TI bought the stock, Wil Brown purportedly told one of the Hursts that TI was rescinding the transaction. Thereafter, the Hurst Group, apparently believing that this oral communication had operated to rescind its sale to TI,[13] began looking for a buyer of the shares it had sold to TI.

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[12] Leon Hurst had Hurst Building & Development Company deed TI some Pike County, Georgia property as additional security.

[13] The promissory notes executed by the Hursts and Robinson, guaranteeing repayment of the purchase price if TI rescinded, were payable on demand. TI made no demand for payment until it rescinded the agreement in writing in March 1985.

D. *The Pelletier-Hurst Group Transaction.*

1. Pelletier Negotiates to Obtain the Hurst Group's Stock and Culpepper's Control of House of Travel.

In early December 1984, Pelletier heard from Culpepper and others that House of Travel was in serious financial trouble and that the Hurst Group wanted to sell its interest in the company. (Culpepper did not know that the Hurst Group had sold its shares to TI.) Pelletier, who owned a local travel agency, Travel Agency Group, believed that House of Travel, which still enjoyed an excellent reputation in the Atlanta area, had great potential and would be a good investment.[14]

Pelletier promptly contacted the Hurst Group and found that it was willing to sell its shares. He did not want to acquire a minority interest in the company (the Hurst Group ostensibly held 40%, and Culpepper 50%, of House of Travel's shares), however, unless he could also acquire from Culpepper the power to manage the company's finances and day-to-day operations – powers that Culpepper possessed as House of Travel's president. He therefore asked Culpepper whether Culpepper would be willing to transfer such powers to him if Pelletier bought the Hurst Group's shares and obtained additional capital for the company. Pelletier thought that Culpepper would agree to do this because Culpepper had said that he was fed up with the Hurst Group's practice of using company

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[14] In addition, Pelletier believed that if he could acquire a principal interest in House of Travel, he would merge his travel agency with it.

funds to pay their personal obligations and wanted them out.[15] Pelletier also asked Culpepper whether he would agree to a neutral board of three directors, consisting of Pelletier, Culpepper, and an independent third party chosen by them.[16] (Apparently, Pelletier, unlike the Hursts, did not believe that the affirmative vote of all three directors was necessary for the board to act. He later changed his mind, though concluding that to neutralize Culpepper's vote the board of directors would have to be increased to four. *See infra* slip op. at p. 1613, p. ___.)

Culpepper indicated a willingness to do these things, and Pelletier said that he would have his attorney draw up a management agreement, reducing their understanding to writing. Following his discussion with Culpepper, Pelletier gave his notes of the discussion to Frank M. Conner III, an associate with the Alston & Bird law firm in Atlanta, and instructed Conner to draft a written agreement that would accomplish his objective.

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[15] During this conversation, Culpepper told Pelletier that the Hurst Group had misappropriated company funds by using the company's expense accounts to pay for personal expenses and that he and Zweifel, House of Travel's attorney, were threatening to put the members of the Hurst Group "in jail for these indiscretions." Pelletier told Culpepper that the Hurst Group was accusing Culpepper of the same thing.

[16] Pelletier suggested that, if he and Culpepper could not agree, they would have Arthur Anderson & Co. pick the third director.

2. Pelletier Buys the Hurst Group's Stock.

On December 29, Pelletier acquired the Hurst Group's interest in House of Travel, pursuant to stock purchase agreement Conner drafted and the parties signed the day. The agreement recited that, upon its execution, Pelletier became the owner of the Hurst Group's House of Travel stock. In payment for the stock,Pelletier gave the Hurst Group $10,000 in cash, a check for $82,600, which the Hurst Group was to hold "in escrow" until January 15, 1985, and a promissory note in the sum of $50,000, payable on January 15, 1986. Pelletier, in turn, received the following: an affidavit executed by William Charles Hurst (in whose name the stock certificate for the Hurst Group's shares had been held) stating that House of Travel should issue a new stock certificate to Pelletier to indicate his acquisition of the Hurst Group's interest in the company;[17] the resignations of the two Hursts from their positions as officers and directors of House of Travel; and the Hurst Group's promise to use its best efforts to obtain releases for House of Travel from certain debts. It was agreed that Pelletier would not deliver the Hursts' resignations to the company, and the resignations to the company, and the resignations would remain secret, until Pelletier had entered in to a written management agreement with Culpepper.

Finally, in a subsidiary agreement, which, for obvious reasons, was not to be disclosed to Culpepper, the Hurst Group agreed to use its best efforts in pursuing its state

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[17] Apparently, Hurst had not found his certificate and thus could not simply transfer it to Pelletier.

court claim against Culpepper for the specific performance of their October 7, 1983 stock purchase agreement, and to allow Pelletier to select the lawyer to represent the Hurst Group in prosecuting the case. If, in that case, the Hurst Group obtained a decree requiring Culpepper to tender his House of Travel shares to the Hurst Group, then Pelletier would purchase these shares from the Hurst Group for $1000.[18]

Pelletier wanted the subsidiary agreement as a means of protection; he did not trust Culpepper and, as he later testified when deposed in this case, he "might [have been] foolish [to] think[] that it was going to be so easy to

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[18] Inexplicably, the subsidiary agreement did not require Pelletier to reimburse the Hurst Group for the price, $32,000, that it would have to pay Culpepper for the shares if it won the suit. The relevant language of the subsidiary agreement provided as follows:

> The parties agree that if [the Hurst Group's] request for specific performance of the agreement is granted by any court with the result that Mr. Culpepper is required to transfer the record ownership of the Shares and any other shares of common stock of [House of] Travel to [the Hurst Group], [the Hurst Group] shall immediately sell, convey and transfer the Shares and any other shares of common stock of [House of] Travel owned by [the Hurst Group] to Pelletier in exchange for a payment by Pelletier in the form of a certified check to Plaintiffs in the amount of One Thousand Dollars ($1,000).

Thus, according to the plain language of the agreement, the Hurst Group bound itself to make a $31,000 gift to Pelletier if it won the suit (assuming that the possibility of recovering the stock had not been factored into the price Pelletier paid for the shares).

get Culpepper to agree to what he already agreed to; in other words, to get it on paper." Thus, by gaining control over the Hurst Group's prosecution of its suit against Culpepper and, if the suit was successful, an additional 40% of House of Travel's outstanding shares, Pelletier minimized the negative consequences of Culpepper's refusal to agree "on paper."

3. Pelletier Fails to Gain Control.

With the stock purchase agreement and the secret subsidiary agreement in hand, Pelletier and Conner met with Culpepper on January 8, 1985, at Conner's law office, to discuss the management agreement Conner had drafted at Pelletier's request. Zweifel, whose law firm, Lokey & Bowden, represented House of Travel, attended the meeting to advise Culpepper whether the agreement Pelletier would be presenting would serve House of Travel's best interests and, further, would be consistent with the company's charter and bylaws. Pelletier had never met, or even heard of, Zweifel and thought that Zweifel was there to represent Culpepper. We accept Pelletier's interpretation of Zweifel's role for purposes of deciding this appeal: at the meeting, Zweifel acted as counsel for both Culpepper and House of Travel.

Zweifel arrived at Conner's office ahead of Culpepper and Pelletier, and Conner handed him a draft of the agreement Pelletier had asked him to prepare. Zweifel read the draft and told Conner (before Culpepper and Pelletier appeared) that Culpepper would never sign the

agreement. For one thing, the draft provided no consideration flowing from Pelletier either directly or indirectly (through House of Travel) to Culpepper.

Conner's draft, in its preamble, state that Pelletier was "in the process of consummating the acquisition of [the Hurst Group's] stock," but that "[p]rior to consummating the acquisition of the [Hurst Group's stock], it [was] necessary for Pelletier to enter into an agreement with Culpepper," i.e., the agreement Conner had drafted. This quoted language indicated, falsely, that Pelletier had not yet purchased the Hurst Group's stock; actually, as we have noted, Pelletier had bought the stock ten days earlier, on December 29, 1984, pursuant to the stock purchase agreement Conner, himself, had prepared.[19]

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[19] When asked on deposition, during the discovery in this case, how he could reconcile this quoted language with the language of his December 29 stock purchase agreement with the Hurst Group, which state that, upon execution of that agreement, Pelletier acquired the Hurst Group's stock, Conner offered the following explanation:

> Q. In drafting [the January 8 agreement between Pelletier and Culpepper], was it your intent to leave the impression in the mind of the reader that the [December 29] Stock Purchase Agreement [with the Hurst Group] was not yet complete?
>
> A. There was no intent with respect to this particular language other than two thoughts that I had. And the first was an effort on my part to characterize the overall transaction contemplated by the Stock Purchase Agreement in a manner that was consistent with how we perceived it and how it actually came about. And what I mean by that it was

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As soon as Pelletier and Culpepper arrived at Conner's office, Pelletier made his presentation. He predicted

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clear in [Pelletier's] mind *that is was a condition precedent to entering into the Stock Purchase Agreement that he reach or come to an agreement with Mr. Culpepper as to how the company would be managed after the actual stock purchase.*

. . . .

The second thought behind it is if you review the Stock Purchase Agreement, it's very evident that we contemplated a number of different transactions occurring, certainly more than just the purchase of 40 shares of common stock. If you look at how we structured the payment of the purchase price, as we discussed before, you had only $10,000 being paid on December 29, the vast majority of the purchase price being put into an escrow until January 15th, and the note being due and payable on January 15, 1986.

It is clear from my memory *that we were trying to create an informal escrow arrangement that we contemplated certain events occurring, primarily the entering into the written Agreement with Mr. Culpepper.*

If you look at the facts surrounding the actual stock purchase on December 29th, it is clear that we were not a stockholder of record. We did not even have a stock certificate in hand. . . . So all of this is to say that *we saw or perceived the transaction from a substantive perspective as being one large transaction with a number of different elements, that it was a fluid transaction, that it would occur over a period of time.* And that was the intent behind the language.

. . . .

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an optimistic future for House of Travel if Culpepper signed the management agreement Conner had drafted and if Pelletier's purchase of the Hurst Group's stock went through. Pelletier knew, of course, that he had already bought that stock,[20] but he wanted Culpepper, and Zweifel, to believe that his deal with the Hurst Group was still in the negotiation stage.[21] After Pelletier

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Q. *Isn't it true that you didn't want Mr. Culpepper to be in a position where he knew that Mr. Pelletier had acquired nearly a 40 percent interest in the company and had no way to back out of that, no options, no recourse?*

A. *We would have preferred that he not know that. . . .*

(Emphasis added.)

[20] Pelletier testified that, in his mind, he acquired the Hurst Group's stock on December 29, 1984. Had he tried later to rescind the deal, he would have expected the Hurst Group to sue him.

[21] Pelletier confirmed this in testimony he gave in the state court suit he subsequently brought against Zweifel and the Lokey & Bowden law firm for allegedly breaching their professional duties to him as House of Travel's counsel. *See infra*, slip. op. p. 1624, p. ___. As the Georgia Court of Appeals wrote, in dismissing Pelletier's claims against these attorneys, "[Pelletier] testified that [in making his presentation to Culpepper, and Zweifel, at Conner's law office, on January 8, 1985,] he wished Culpepper to believe that he had not yet consummated the transaction with the Hurst Group but to believe that he was still negotiating with that group of shareholders as well as Culpepper." *Lokey & Bowden v. Pelletier*, 192 Ga.App. 470, 385 S.E.2d 90, 91 (1989).

finished his presentation, he summarized the management agreement Conner had prepared. Zweifel then commented on the document. He said, quite bluntly, that the proposed agreement was "not what [House of] Travel needed." At this point, Culpepper said that he wanted to confer privately with Zweifel, and they withdrew to another room. There, Zweifel advised Culpepper not to sign the document, explaining that the agreement was one-sided: Pelletier would not be obligated to do anything for Culpepper or the company.[22] Culpepper decided to follow Zweifel's advice, and they returned to Conner's office and informed Pelletier and Conner that

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[22] Zweifel's advice was imminently sound. When Conner handed him a draft of the proposed agreement, Zweifel recognized that it failed to address several important facets of a binding agreement. First, Pelletier had not spelled out his financial commitment to House of Travel. If Culpepper desired anything from his negotiations with Pelletier, it was to come to an understanding on Pelletier's acquisition of working capital for the company. Yet the draft agreement contained no commitments for cash or credit – Pelletier only agreed to become a shareholder in House of Travel by purchasing a third party's stock. Certainly Culpepper would demand more consideration flowing to him in exchange for surrendering his authority at House of Travel. Second, Zweifel must have recognized that the agreement failed to provide for the dismissal of the Hurst Group's specific performance suit against Culpepper. Although at the time Pelletier was concealing his control of this litigation, Zweifel, acting in Culpepper's, and the company's, best interest, would have attempted to bring the Hurst Group into the negotiations and compromise their claims before permitting Culpepper to sign anything with Pelletier. With these defects in the agreement presented to Culpepper, Zweifel would have been remiss in advising Culpepper that it was acceptable.

their negotiations had ended. At this point, Pelletier abandoned his efforts to get a management agreement from Culpepper; to accomplish his objective, the managerial control of the company, Pelletier would use the courts – in particular, the courts' power to issue injunctions and temporary restraining orders.

4. Pelletier Goes to Court to Gain Control

On January 9, the day after Culpepper refused to sign the contract Conner had prepared, Pelletier wrote Peter Q. Bassett, one of the partners in Conner's law firm who specialized in litigation. Attached to Pelletier's letter were a series of exhibits, including Pelletier's December 29, 1984 stock purchase agreement with the Hurst Group and a statement entitled: "Facts Regarding Buckhead House of Travel." The letter and the exhibits, collectively, informed Bassett that Pelletier had purchased the Hurst Group's House of Travel stock on December 29, 1984; that Culpepper had induced Pelletier to purchase the stock by telling Pelletier that, if Pelletier bought the Hurst Group's stock, he would be willing to give him control over the financial affairs of the company and its day-to-day operations; that Pelletier had Conner prepare a formal agreement to this effect; and that when Conner presented the agreement to Culpepper on January 8, 1985, Culpepper refused to sign it. The letter and exhibits also informed Bassett of the suit the Hurst Group had brought against Culpepper in state court, seeking the specific performance of Culpepper's contractual obligation to sell it 40 of his House of Travel shares, and that the Hurst Group

had given Pelletier the right to control the prosecution of that suit with a lawyer of his choice.

In his letter, Pelletier instructed Bassett "to proceed in this matter as aggressively and expeditiously as possible," and "to consider the following courses of action." First, Pelletier instructed Bassett to consider instituting a judicial proceeding to have "a receiver immediately appointed" to take over House of Travel's operations. Alternatively, Bassett was to consider asking the court to "appoint a Provisional Director" for the company. This would give the company four directors – Culpepper, Charles and Leon Hurst, whose resignations Pelletier told Bassett to "sit on" so that they could continue to function as Pelletier's nominees, and the provisional director, who presumably would side with the Hursts, thus giving Pelletier the 75% vote he thought House of Travel's bylaws required before the board of directors could act.[23] Second,

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[23] Pelletier, the Hurst Group, and their attorneys all believed that the deadlock in the existing board of directors (Culpepper and the Hursts) was irresoluble without court action. As we note above, *see supra* note 8, the company's bylaws provided that the board could act only with a 75% majority. Because the board consisted of only three directors, it could act only with a unanimous vote, which appeared unlikely given the antagonistic relations between Culpepper and the Hursts. The shareholders could increase or decrease the number of directors, but could do so only with a majority vote – again unlikely given the alignment of Langston (10% of the shares) with the Hurst Group (40% of the shares). Any vote of the shareholders to increase or decrease the number of directors almost certainly would result in a tie. Finally, with Culpepper owning 50 of the 100 outstanding shares, the Hurst Group owning 40 shares, and Langston owning 10 shares, no

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Pelletier instructed Bassett to consider bringing on behalf of Langston, not Pelletier, a shareholders' derivative action against Culpepper "on grounds of misfeasance and R.I.C.O. (if we can substantiate any criminal acts)." Third, Pelletier instructed Bassett to "[c]ommence depositions immediately" in the Hurst Group's suit against Culpepper for specific performance. In giving Bassett this instruction, Pelletier was apparently exercising the right the Hurst Group had given him in the December 29 subsidiary agreement to control the prosecution of that suit.

Fourth, and finally, Pelletier instructed Bassett, "as economic pressure," to "have several of [House of Travel's] corporate lenders place [it] in default." Pelletier thought that this might cause Culpepper to accede to his demands. Pelletier added that making Culpepper "deal with [the Hursts and Robinson] is probably the greatest pressure we can place on Culpepper. Economic pressures would come a close second."

On the same day, January 9, that Pelletier was instructing Bassett on how to proceed against Culpepper,

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matter which way Langston voted his shares, no faction could elect more than two of the three directors. The bylaws provided that each share was entitled to one vote in an election of directors, and the Georgia Code provided that voting would be noncumulative (i.e., the top three vote-getters would win), *see* Ga.Code Ann. § 14-2-728 (1989). Therefore, no faction could elect all three directors unless it controlled at least 76 shares. Consequently, Pelletier, and subsequently Bassett, believed that the only solution to the deadlock was a court-appointed fourth director who would vote with the Hursts.

Conner was communicating with Zweifel by telephone. Conner called Zweifel to inform him that Pelletier had purchased the Hurst Group's interest in House of Travel.[24] He took Zweifel by surprise; Zweifel thought that Culpepper's refusal to sign the management agreement Conner had presented to him on January 8 had caused Pelletier to abandon his plan to purchase the Hurst Group's stock.

After informing Zweifel that Pelletier had acquired the Hurst Group's interest, Conner asked Zweifel to issue Pelletier a stock certificate for his 40 shares. Conner told Zweifel that he did not have the Hurst Group's stock certificate; William Charles Hurst had lost it. Conner said that Hurst had given him an affidavit, stating that he had lost the certificate, and asked Zweifel whether he would honor the affidavit and issue Pelletier a certificate. Zweifel said that he would if Conner would write him a letter confirming that this stock transaction had taken place and enclosing Hurst's affidavit. Conner wrote Zweifel the next day, January 10, as requested.

A day or so after Zweifel received Conner's letter and Hurst's affidavit, he prepared a new certificate in Pelletier's name and asked Leon Hurst, House of Travel's secretary, to sign it. Leon Hurst told Zweifel to mail the certificate to his attorney, Brant Jackson, and stated that he would sign the certificate at Jackson's office and deliver it to Pelletier. On January 15, Zweifel drafted a letter to Jackson, stating that he was forwarding a House

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[24] The record does not reveal whether Conner informed Zweifel of the date on which Pelletier had purchased the Hurst Group's interest.

of Travel stock certificate to him at Leon Hurst's request, but the next day, before Zweifel could mail the letter, Bassett called him to say that he had just filed suit (which the parties, and therefore we, refer to as the shareholders' derivative suit) in the Superior Court of Fulton County, Georgia, against House of Travel, Culpepper, and the two Hursts. The plaintiffs, Bassett said, were Pelletier and Langston.

Bassett's complaint contained six claims for relief. Three of these were claims Pelletier had instructed Bassett to pursue: count one of the complaint requested, on behalf of both plaintiffs, the appointment of a receiver pursuant to Ga.Code Ann. § 9-8-1 (1982);[25] count two requested, again on behalf of both plaintiffs, the appointment of a provisional director pursuant to Ga.Code Ann. §§ 14-2-940, -941 (1989);[26] and count three, a shareholders' derivative claim brought only Langston, sought money damages against Culpepper for violations of the Georgia RICO statutes, Ga.Code Ann. §§ 16-14-1 to -15 (1988) Of the remaining counts, which were lodged against Culpepper alone, one count sought money damages for both plaintiffs on the ground that Culpepper had

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[25] Ga.Code Ann. § 9-8-1 states, in pertinent part: "When any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it, a receiver of the same may be appointed. . . . "

[26] Ga.Code Ann. §§ 14-2-940(a)(2), -941(a)(7) provide that the court may appoint a provisional director when a corporation's board of directors is deadlocked, the shareholders cannot break the deadlock, and the corporation is suffering irreparable harm from the deadlock.

breached "fiduciary duties and other duties owed by Culpepper as shareholder and President, to Plaintiffs." The second count sought money damages for Pelletier for Culpepper's breach of an oral promise he had made to Pelletier, prior to Pelletier's December 29, 1984 acquisition of the Hurst Group's House of Travel stock, to transfer to Pelletier "complete financial control" of House of Travel and "supervisory responsibility" over its employees. The third count sought money damages for Pelletier on the ground that Culpepper never intended to perform the oral promise referred to in the preceding count and thereby fraudulently induced Pelletier to purchase the Hurst Group's stock.

In addition to the relief described above, Bassett's complaint asked for a temporary restraining order against Culpepper, requiring that Culpepper maintain the status quo in House of Travel's day-to-day operations and that he make the company's books and records available for inspection by the company's officers, directors, and shareholders. The complaint also prayed that the court convert the temporary restraining order into a preliminary and, then, a permanent injunction.

Meanwhile, Pelletier apparently had second thoughts on who should prosecute the Hurst Group's specific performance action against Culpepper - Bassett or another attorney. Pelletier decided that a different attorney should handle that case, and on January 14, 1985, he contacted Herbert P. Schlanger. Pelletier told Schlanger about the case and that the Hurst Group, by contract, had given him the right to prosecute its claim against Culpepper with an attorney of his choice. Pelletier wanted Schlanger to handle the prosecution of the case. He explained

that the Hurst Group would remain in the case as the party plaintiff, but only as his, Pelletier's, nominee – Pelletier, not the Hurst Group, would be Schlanger's client and would pay all of Schlanger's fees and expenses. Schlanger accepted the assignment.

The next day, Pelletier contacted Schlanger again, to tell him that Bassett would soon (on January 16) be filing a shareholders' derivative suit against Culpepper and House of Travel and that William and Leon Hurst would be named as co-defendants in the case. Pelletier explained that he and Langston were bringing the suit; he also explained that they would be seeking no relief of any kind against the Hursts.[27] Rather, Culpepper was their target; by having the Hursts in the case as cooperating parties defendant, they could bring more pressure on Culpepper. Pelletier asked Schlanger if he would file an appearance in the case as counsel for the Hursts and, at the same time, represent his, Pelletier's, interests in the matter. Schlanger said that he would take on this additional assignment, and for the next three and a half

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[27] Given that the complaint Bassett filed sought no relief against the Hursts, he, and Schlanger, were asked – when deposed in the instant case – what reason there was to sue them. Bassett and Schlanger testified that they believed that the Hursts, as House of Travel directors, had to be named as parties defendant in order for Pelletier and Langston to obtain relief (on behalf of House of Travel) on their shareholders' derivative claim against Culpepper. We find no basis for such belief in the Georgia code or case law; *see* Ga.Code Ann. §§ 14-2-740 to -747 (1989); *Smyly v. Smith*, 216 Ga. 529, 118 S.E.2d 188, 189 (1961) (holding that company must be named as defendant, but not mentioning directors), or, for that matter, in jurisprudence anywhere.

months, i.e., until the prosecution of the suit was stayed automatically by House of Travel's commencement of chapter 11 proceedings in the bankruptcy court, Schlanger, while ostensibly representing the Hursts, followed Pelletier's instructions and represented his interests. As Pelletier later testified on deposition in the instant case, he paid all of the fees Schlanger charged and the expenses he incurred in representing the Hursts; he and Schlanger maintained the same attorney-client relationship during the prosecution of the shareholders' derivative suit against Culpepper that they maintained during the prosecution of the Hurst Group's suit against Culpepper. In short, according to Pelletier, the Hursts were to take "whatever steps were necessary" to accomplish his objectives.

Following his conversation with Pelletier, and before Bassett filed his suit, Schlanger decided that it "might be a good tactical move" for Pelletier if the Hurst Group sued Culpepper in federal court for securities fraud.[28] He discussed the idea with Pelletier and one of the Hursts, and they agreed that Schlanger should file the suit. Proceeding with great haste, Schlanger drafted a complaint and showed it to Bassett – "to ensure that [he] was not misstating the facts as [they] knew them at the time." Bassett found no misstatements, and, on January 16, the same day Bassett brought the shareholders' derivative

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[28] Schlanger, in testifying on deposition in the instant case, did not explain how this move would benefit Pelletier or the Hurst Group, nor was he asked. Whatever his tactical reasons for filing the suit, Schlanger apparently abandoned them; he failed to prosecute the case.

action in state court, Schlanger filed suit in the federal district court in Atlanta: he named the Hurst Group as plaintiff and Culpepper as defendant. Schlanger also moved the district court to issue a temporary restraining order – an order that contained the same provisions as the temporary restraining order Bassett was simultaneously requesting the state court to issue.

Schlanger based his complaint, which was framed in one count, on the same transaction that gave rise to the Hurst Group's specific performance action against Culpepper, i.e., the Hurst Group's October 7, 1983 contract with Culpepper and Langston for the purchase of 80% of House of Travel's shares of common stock. Schlanger did not, however, seek Culpepper's performance of that contract; rather, he sought the recovery of money damages under 15 U.S.C. §§ 77*l*(1), (2), 77q(a), and 78j(b) (1988) and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990).[29] Schlanger alleged, in his complaint, that Culpepper, at the time he entered into the agreement, fraudulently misrepresented that he intended to discharge the obligations he was assuming and thereby induced the Hurst Group to purchase Langston's House of Travel shares. Schlanger alleged that Culpepper's conduct violated the federal

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[29] The complaint recited that the case also "involve[d] pendent claims under state law with respect to the sales of securities, misrepresentations, fraud and contracts." It contained no additional counts, however, beyond the one brought under the federal securities laws cited in the text *supra*. Had Schlanger intended to bring additional claims under state law, we assume that he would have brought them in separate counts, as required by Fed.R.Civ.P. 10(b).

securities laws and rendered him answerable to the Hurst Group for money damages under those laws.

The complaints in Bassett's and Schlanger's suits were filed at about the same time on January 16, around 9:00 a.m.; by 9:15 a.m., Bassett had the temporary restraining order he had prayed for in his complaint. At this point Bassett called Zweifel to say that he had just sued House of Travel, Culpepper, and the Hursts in state court and had obtained a temporary restraining order, which, among other things, prevented Culpepper from altering or removing House of Travel business documents or selling or encumbering its assets except in the ordinary course of business. During the conversation, he and Zweifel discussed the possibility of substituting a consent decree for the temporary restraining order and decided to meet later in the day to explore the possibility further.

They met shortly before noon; Schlanger and Culpepper joined them. The meeting, which went until late in the afternoon, resulted in a consent decree, incorporating the provisions of the temporary restraining order and describing the House of Travel records Culpepper was to produce and how he was to produce them. In exchange for the consent decree, Schlanger agreed not to pursue his request for a temporary restraining order in the federal district court, and he informed the district court that he no longer needed the order. (According to the clerk's docket sheet for the case, Schlanger told the court that the case had been settled. When, thereafter, he failed promptly to dismiss the case, the court dismissed it sua sponte without prejudice.)

As soon as the meeting ended, the attorneys submitted the consent decree, which had been signed by Bassett (on behalf of Pelletier and Langston), Schlanger (on behalf of the Hursts), Sweifel (on behalf of House of Travel), and Culpepper, to the superior court judge who had issued the temporary restraining order. The judge approved the decree, and it took effect that day.

The next morning, January 17, Schlanger, Pelletier, Leon Hurst, and Pelham Robinson appeared at House of Travel's office to examine the company's records. After a brief conversation with Culpepper and Zweifel, they began their examination. Schlanger asked to see the company's accounts receivable and several other documents, many of which would reveal the identity of most of House of Travel's clients, and Zweifel objected. Pelletier owned a competing travel agency, and Zweifel believed that to permit Pelletier access to these documents would be to disclose House of Travel's "trade secrets," something he was not prepared to do. Schlanger announced that he would have the superior court settle the matter, and later in the day, he, Bassett, Zweifel, and Hamilton Lokey and Gerald Handley (partners of Zweifel's) appeared before the judge who had signed the consent decree. After hearing from counsel, the judge concluded that Culpepper and House of Travel had not been complying with the consent decree and directed them to obey it. The judge, however, understood Zweifel's concern that Pelletier not obtain the identity of House of Travel's clients, and, in the handwritten order he issued following the hearing, he provided that the names of the clients be redacted from the company's records from the records were produced for examination. The following morning,

the examination of the records continued without further dispute.

The next significant events took place on January 25. First, Bassett amended the complaint in the shareholders' derivative suit to add a count seeking the liquidation of House of Travel pursuant to Ga.Code Ann. § 14-2-1430 (1989). Bassett alleged that the company's three directors were hopelessly deadlocked, i.e., neither faction on the board, Culpepper or the two Hursts, was able to muster the 75% affirmative vote the company's bylaws required for the directors to act; that the appointment of a provisional director, pursuant to Ga.Code Ann. § 14-2-941, would not alleviate the situation; that House of Travel's management, i.e., Culpepper, was wasting the company's assets; and that unless the company were liquidated, its shareholders would lose what equity they still had in the company. Bassett requested the appointment of a receiver to accomplish the liquidation.

Second, Schlanger, having appeared as counsel for the Hurst Group in its specific performance action against Culpepper, noticed Culpepper's deposition in that case for February 4, 1985. Schlanger used the Hurst Group's right to depose Culpepper in that case as a means of interrogating him in the two suits that had been brought on January 16 – the state court shareholders' derivative suit and the federal court securities fraud suit.[30] (Both the

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[30] In his deposition in the instant case, Schlanger testified that

> [i]t was obvious that we could not get access to any information in the [shareholders' derivative

(Continued on following page)

Georgia and federal procedural rules, which dictated when the deposition of a defendant could be taken, prohibited the taking of Culpepper's deposition in those two cases for thirty days from the date, January 16, the complaints were filed unless leave of court were obtained.[31] By using the specific performance action as the vehicle for noticing Culpepper's deposition, Schlanger was able to circumvent these prohibitions.)

Third, Zweifel, as House of Travel's counsel, responded to Pelletier's demand that Zweifel issue him a stock certificate for the House of Travel shares he had purchased from the Hurst Group on December 29, 1984. Zweifel did so by writing Pelletier, in care of his attorney, Bassett, and, also, William Charles Hurst, in care of his attorney, Schlanger. The two letters were identical, and

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(Continued from previous page)

> suit], . . . and there was available another piece of pending litigation in which discovery could be taken. And I am certain that at some time during this period of time we did decide to attempt to get some discovery through the [specific performance] litigation.

[31] The federal and Georgia rules, which are identical, provide that a plaintiff may not take a defendant's deposition within thirty days of filing the complaint and serving the summons, unless leave of court is obtained. *See* Fed.R. Civ.P. 30(a); Ga.Code Ann. § 9-11-30(a) (1982). Although the two rules are written in terms of preventing a plaintiff from taking a deposition within thirty days of filing, the rules are designed to protect defendants, *see* Fed.R.Civ.P. 30 advisory committee's note, and certainly would apply to adversarial codefendants (the Hursts in Pelletier's shareholders' derivative suit against Culpepper) who wish to take another defendant's (Culpepper's) deposition.

advised Pelletier and Hurst that a new certificate would not issue for the following reasons: (1) the allegations of the complaints in the Hurst Group's state and federal court suits against Culpepper for specific performance and for securities fraud, respectively, raised the question whether the Hurst Group actually owned any House of Travel stock, i.e., whether Culpepper's allegedly fraudulent conduct on October 7, 1983, had, in effect, vitiated the Hurst Group's purchase of Langston's shares in the company; (2) assuming that it acquired the stock, the Hurst Group had pledged the stock to Langston as security for a $26,000 promissory note, and, according to House of Travel's corporate minute book, the pledge was still in effect – Zweifel advised that until Langston assured him that the stock had been released from the pledge, he could not issue a new certificate; (3) before a new certificate could issue, William Charles Hurst would have to produce his stock certificate or, in lieu thereof, as required by Ga.Code Ann. § 11-8-405(2)(b) (1982), a bond, issued by a commercial surety, in the amount of $150,000 – approximately the price Pelletier paid the Hurst Group for its shares – indemnifying House of Travel for any damages it might sustain for wrongfully issuing a certificate to Pelletier; (4) the Hurst Group's certificate contained a legend which indicated that the shares represented by the certificate could not be sold or transferred unless a registration statement was filed as prescribed by federal law or the sale or transfer was exempt from registration under both federal and state law. Zweifel advised that he would not issue Pelletier a certificate unless the Hurst Group and Pelletier demonstrated

that a registration statement had been filed or that the sale was exempt from registration.

The same day, January 25, Zweifel sent Schlanger copies of the letters he had written to Pelletier and William Charles Hurst. In the cover letter accompanying the copies, he told Schlanger that, given the uncertainty as to who owned the 40 shares at issue – Langston, the Hurst Group, or Pelletier[32] – he would not permit Pelletier or the Hursts to examine any of House of Travel's records. Zweifel added that if Schlanger insisted on such examination, he would seek direction from the superior court in the form of a clarification of the consent decree the court had signed; he indicated that he was willing to appear before the court at Schlanger's convenience. Schlanger promptly moved the superior court to hold House of Travel and Culpepper in contempt, for refusing to comply with the consent decree, and requested an emergency hearing on the matter. The hearing was never held.

Sometime between January 25 – when he amended the complaint in the shareholders' derivative suit to seek the appointment of a receiver and the liquidation of House of Travel – and February 4, Bassett discovered that he had erred in concluding that a simple majority of House of Travel's three directors could not amend the company's bylaw that required 75% of the directors to agree before the board of directors could act. Bassett had

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[32] At this point, Zweifel did not know that the Hurst Group had sold its House of Travel shares to TI on November 1, 1984, and that TI owned the shares when Pelletier purported to buy them from the Hurst Group on December 29, 1984. *See infra* slip op. p. 1633, p. ___.

overlooked the Georgia statute that gave simple majority of a corporation's directors the power to amend a company bylaw that imposed a supermajority voting requirement for board action. *See* Ga.Code Ann. § 14-12-1022(a)(2) and *supra* note 9. Given this statute, Bassett concluded that the two Hursts could override Culpepper's negative vote and change House of Travel's bylaws to provide that a simple majority of directors could exercise the board's powers. In short, the Hursts could strip Culpepper of his president's role, manage the company for Pelletier, and possibly make the liquidation of the company unnecessary. Bassett promptly shared his discovery with Schlanger, and they agreed that the Hursts, speaking through Schlanger, would immediately call a special meeting of House of Travel's board of directors.[33]

On February 4, Schlanger, acting for the Hursts (and, through them, Pelletier), wrote Culpepper's and House of Travel's attorneys – Nicholas P. Chilivis, whom Culpepper had recently retained, and Zweifel – and requested that Culpepper, as company president, schedule a special meeting of the board at a time no later than February 11 for the purposes of, among other things, (1) amending the company's bylaws to change the 75% supermajority voting requirement to a simple majority voting requirement; (2) discharging the company's officers and appointing

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[33] The bylaws provided for two types of director's meetings: regular annual meetings that occurred, without notice, immediately following the annual shareholders' meetings, and special meetings called at any other time with three days' notice.

new officers; and (3) discharging the company's counsel (Lokey & Bowden), and retaining new counsel. A day or two later, Schlanger, Chilivis, and Zweifel agreed that a special meeting would take place on February 8, instead of February 11, but it was postponed to enable Pelletier and Culpepper, and their attorneys, to discuss the possibility of a settlement. They were unable to reach a settlement, and on February 11 Schlanger wrote Chilivis and Zweifel again, asking them to reschedule the board meeting for a time no later than February 15. Gerald Handley, a Lokey & Bowden partner who had been assisting Zweifel in the House of Travel matters, responded: he told Schlanger that a settlement was still possible and asked for more time. Schlanger declined to give it and, moreover, treated Handley's response as a refusal by Culpepper to reschedule the board meeting The company's bylaws provided that, if the president refused to call a special meeting when requested by a director, any two directors could do so. On February 12, drawing on this provision, the Hursts, acting through Schlanger, noticed a special meeting for 3:00 p.m. on February 15 at the Lokey & Bowden law office.

The meeting took place as scheduled, but it lasted only a few minutes. Schlanger, who came with the Hursts, wanted the meeting recorded, so he brought a court reporter. Zweifel, who was there with Culpepper, objected to the court reporter's and Schlanger's presence. When the reporter and Schlanger left the room, the meeting began. Leon Hurst moved that paragraph 3.10 of the bylaws – the 75% supermajority provision – be amended to permit the board to act on a simple majority vote. William Charles Hurst seconded the motion, and it

passed, Culpepper voting no. According to some corporate minutes Schlanger later prepared (based on what the Hursts told him), Leon Hurst then moved that the meeting be "adjourned" in accordance with "paragraph 3.13 of the bylaws . . . until 4:30 p.m. at the offices of Herbert P. Schlanger." The motion carried (on the Hursts' vote), and the meeting adjourned. At this point, Schlanger returned to the room and stated that the meeting would continue at his office with or without Culpepper and Zweifel and that the court reporter would be present to record the meeting. Culpepper and Zweifel attended the meeting, under protest.

The meeting resumed at 5:00 p.m.; the Hursts, Culpepper, and Zweifel were present. As the first order of business, Leon Hurst moved that the board invite Schlanger and Bassett to join the meeting. William Charles Hurst seconded the motion, it passed, Culpepper voting against it, and Schlanger and Bassett entered the room. Next, Leon Hurst moved that the court reporter join them. The motion passed, Culpepper again voting no. After the court reporter entered the room and began transcribing what took place, Culpepper objected to any further proceedings on the ground that the meeting had been improperly called. In his view, because the meeting at the Lokey & Bowden law office had been adjourned, it could not be resumed without three days' notice, as provided in the bylaws; consequently, any action taken at that time would be null and void. The Hursts ignored Culpepper's objection and proceeded with the agenda set forth in the written notice they had given Culpepper on February 12. Turning to that agenda, the Hursts, over Culpepper's negative vote, (1) replaced themselves as the

company's vice president and secretary/treasurer with James Lurwig; (2) gave Lurwig most of Culpepper's authority as company president; and (3) replaced Lokey & Bowden with Cofer, Beauchamp, Hawes & Harrold as counsel for the company.[34]

Following these events of February 15, a potential purchaser of House of Travel's assets appeared on the scene and for three weeks – until it became apparent that a deal could not be made – the parties put aside their differences. On March 10, hostilities resumed – at a board of directors meeting. All three directors were present, together with their attorneys – Gary P. Bunch[35] representing Culpepper and Schlanger representing the Hursts (and therefore Pelletier). Bassett also attended the meeting – to protect Pelletier's interests. The agenda was the same as the agenda set forth in the Hursts' notice of the February 15 board meeting. Over Culpepper's negative vote, the Hursts ratified the actions taken on February 15, and they went one step further: they fired Culpepper as company president and gave the office to James Lurwig.

On March 12, James Lurwig had his first contact with House of Travel's employees. He visited the company's Buckhead office, where most of the employees were stationed, introduced himself as the new president, and, after indicating what he expected from them, asked for their cooperation. Schlanger and Pelletier were present

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[34] The Hursts took other action as well, but none is pertinent here.

[35] At the time he retained Nicholas P. Chilivis, Culpepper also retained Gary P. Bunch. They practiced in separate law firms.

when Lurwig addressed the employees; the record, however, does not indicate what their participation, if any, may have been. During Lurwig's meeting with the employees, either Culpepper or Bunch made a telephone call to the Buckhead office. The receptionist took the call and, when the meeting was over, told her co-employees that Culpepper wanted to see them at the company's branch office in Smyrna. Several employees went to the branch office and met with Culpepper and Bunch. They returned late that afternoon. Lurwig was still there. They told him that they would not feel comfortable working for him, picked up their belongings, and left.[36]

Sometime during the afternoon of March 12, Bunch telephoned Donald Rickertsen, a lawyer who specialized in bankruptcy matters. House of Travel's financial condition had been deteriorating, and the litigation pending against the company was threatening to put it under. Bunch thought that a chapter 11 reorganization might benefit the company and wanted Rickertsen's advice. After a brief conversation, they decided that a meeting that evening with Culpepper and Zweifel would be helpful.

They met at Zweifel's office, and Culpepper and Zweifel briefed Rickertsen on House of Travel's recent history. Zweifel advised Rickertsen that, as far as he was concerned, Culpepper was still the company's president and that his firm was still its counsel. Zweifel, of course, knew that House of Travel's board of directors had fired Culpepper on March 10; he felt, however, that the board's

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[36] One employee, Emily Langston, remained.

action was invalid. In his view, nothing the board had done at the behest of the Hursts had any validity. He considered the Hursts – who owned no interest in the company – to be Pelletier's nominees. As such, they had not been functioning as independent directors, as the law required.[37]

After he had been briefed, Rickertsen concluded that chapter 11 proceedings would benefit House of Travel and that Culpepper, as its president, could authorize the filing of a chapter 11 petition. Acting as Culpepper directed, Rickertsen filed the petition the following day, March 13.

Also on March 12, TI's attorneys notified the Hurst Group by letter that TI was rescinding the stock sale agreement it had made with the Hurst Group on November 1, 1984. The letter contained an acknowledgment for the members of the Hurst Group to sign, indicating that TI had rescinded the agreement and the attorneys asked them to sign it. On March 26, the Hursts and Robinson signed the acknowledgment, as TI had requested; TI's president, in turn, executed an assignment, which sold,

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[37] Under the Georgia law, a director must discharge his duties "[i]n a manner he believes in good faith to be in the best interests of the corporation." Ga.Code Ann. § 14-2-830(a)(1) (1989). A director "serves the interests of the *entire body of stockholders*, as well as those of the individual shareholder." *Oliver v. Oliver*, 118 Ga. 362, 45 S.E. 232, 233 (1903) (emphasis added). Therefore, a director may not become "the active and successful opponent of an individual stockholder," *id.*, but must attempt to promote the interests of *all* stockholders, *see Quinn v. Cardiovascular Physicians, P.C.*, 254 Ga. 216, 326 S.E.2d 460, 463 (1985).

assigned, and transferred the 40 shares of House of Travel stock TI had purchased on November 1, 1984, back to William Charles Hurst.

By admitting in writing that TI had purchased its House of Travel stock on November 1, 1984, and that TI had maintained ownership of the stock until it rescinded the purchase on March 26, 1985, the Hurst Group effectively acknowledged that it had no House of Travel stock to sell Pelletier on December 29, 1984. Pelletier had already paid the Hurst Group $142,600 for the stock ($10,000 in cash on December 29, 1984, a check for $82,600, which the Hurst Group was to hold until January 15, 1985, and a $50,000 promissory note due on January 15, 1986), and, moreover, Pelletier, representing himself as a House of Travel stockholder, had filed the shareholders' derivative suit in the state superior court. The Hurst Group had a serious problem on its hands. What if Pelletier or Schlanger, who owed his allegiance to Pelletier, found out about the TI transaction? At the very least, Pelletier would want his money back.

The record does not indicate when, if ever, the Hursts or Pelham Robinson informed Pelletier or Schlanger that they had no House of Travel stock to sell on December 29, 1984; all we know is that Zweifel discovered this fact in the fall of 1987, while he and his law firm were defending the suit Schlanger had brought against them on behalf of Pelletier on January 23, 1986 – charging them with having breached the fiduciary duties they owed Pelletier as a House of Travel shareholder.

Meanwhile, Schlanger – apparently believing that Culpepper, who was still holding himself out as the

firm's president despite the board's action of March 10, had convinced House of Travel's employees to leave their posts – turned once again to the courts for relief; this time, he chose the shareholders' derivative suit Bassett had filed for Pelletier and Langston against Culpepper, House of Travel, and the Hursts on January 16. On March 13, Schlanger, appearing as the Hursts' attorney, filed a cross-claim against Culpepper, seeking compensatory and punitive damages, a declaratory judgment, and preliminary and permanent injunctive relief. Schlanger alleged that, on March 10, 1985, the Hursts, constituting two-thirds of House of Travel's board of directors, had amended the company's bylaws to provide that the board of directors could act on a simple majority vote of its members (rather than the previously required supermajority vote); that, once the bylaws were amended, the board, acting on the Hursts' votes, discharged Culpepper as the company's president; that Culpepper refused to acknowledge the board's action and continued to exercise the authority of the office; that Culpepper was wasting the company's assets in a variety of ways; and that, unless restrained by an injunctive order, he would continue to injure the company. Schlanger asked the court to declare valid the bylaw amendment and Culpepper's discharge, and to enjoin Culpepper from holding himself out as House of Travel's president. Schlanger also asked for compensatory and punitive damages for the injury Culpepper had inflicted on the company.

As soon as he filed his counterclaim, Schlanger moved the court for a temporary restraining order, to prevent Culpepper from interfering with House of Travel's day-to-day operations. Schlanger scheduled a

hearing on his motion for 2:00 p.m. that day, March 13, before the superior court judge presiding over the case, and immediately notified all counsel of record – serving them by hand copies of the notice of hearing, the Hursts' cross-claim, and their motion for a temporary restraining order.

The hearing was held as scheduled. Present were five attorneys: Schlanger (representing the Hursts), Bassett (representing Pelletier and Langston), Bunch (representing Culpepper), and Lokey and Handley of Lokey & Bowden (representing House of Travel). Schlanger outlined the facts he had recited in the Hursts' cross-claim and their motion for temporary restraining order.

5. The Bankruptcy Court Takes Control.

While Schlanger and the other attorneys were addressing the superior court, Rickertsen was at the federal courthouse in Atlanta; at 4:41 p.m., he filed a chapter 11 petition for House of Travel. Moments later, the superior court judge announced that he was granting the relief Schlanger was seeking, and would enter a formal written order in the morning. Shortly thereafter, Rickertsen called the judge, informed the judge that he had just filed a chapter 11 petition on behalf of House of Travel, and said that the Hursts' application for a temporary restraining order had been stayed. At that moment, the prosecution of all of Pelletier's, and Langston's, claims in that case ceased. (A few months later, after he sold his House of Travel stock to Elite Travel, Inc., Pelletier dismissed the suit with prejudice.)

The next day, March 14, Cofer, Beuchamp, Hawes & Harrold, Having been employed by the Hursts as House of Travel's new counsel, moved the bankruptcy court to dismiss the petition Rickertsen had filed. Schlanger, appearing for the Hursts, joined in the motion. The movants alleged that the petition had been filed without House of Travel's authorization; they represented that Culpepper, who had signed the petition as the company's president, did not occupy that office at the time, and thus had no authority to speak for the company. Before the bankruptcy court could rule on the motion, the parties – Pelletier, Langston, the Hursts, and Culpepper – and Rickertsen, acting as reorganization counsel for the debtor, agreed that the Hursts would ratify the filing of the petition. They also agreed that Lurwig would manage the day-to-day operations of House of Travel as debtor-in-possession. After they reduced their agreement to writing, the Hursts ratified the filing of the petition, and the bankruptcy court rejected as moot the motion to dismiss the chapter 11 proceedings.

E. *The Pelletier-Elite Travel, Inc. Transaction.*

On May 4, while the bankruptcy proceedings were pending, Pelletier sold his interest in House of Travel, i.e., "all of his right, title and interest in and to any and all shares of stock of [House of Travel] which he may currently have or ever has had," to Elite Travel, Inc. (Elite), a travel agency. The sale was made pursuant to a written agreement, drafted by Schlanger and Bunch, between Elite, Joyce Carson (Elite's president), House of Travel, and Culpepper, "on the one hand," and Pelletier, "on the

other." For his interest in House of Travel, Pelletier received $50,000 half in cash and half in the form of a promissory note executed by Elite, Carson, and Culpepper. Pelletier also received from House of Travel a partial assignment of any claims that it might have against Zweifel and Lokey & Bowden. The terms of the assignment were, essentially, as follows: (1) Pelletier alone would decide what claims, if any, House of Travel had against Zweifel and Lokey & Bowden and whether to pursue them; (2) if he decided to bring suit against Zweifel and Lokey & Bowden, Pelletier, with leave of the bankruptcy court, would bring it in House of Travel's name, with a lawyer of his choice, and at his (Pelletier's) expense; and (3) of the net proceeds of any recovery, Pelletier would receive 70%, House of Travel 20%, and Elite 10%. Finally, Pelletier agreed to dismiss with prejudice the two state court suits he had been prosecuting: his (and Langston's) shareholders' derivative suit against Culpepper, House of Travel, and the Hursts, and the Hurst Group's suit against Culpepper for specific performance.

After this transaction, Pelletier's position vis-a-vis Zweifel and Lokey & Bowden was as follows. First, he could not longer claim that he was a House of Travel shareholder;[38] therefore, he could not bring a

[38] Actually, as we have already noted, Pelletier never was a House of Travel shareholder; whatever House of Travel stock he thought he owned came from the Hurst Group which had none. Pelletier may not have known this, however, on May 4, 1985, when he sold what he thought was his stock to Elite. For purposes of this appeal, we assume that, on May 4, 1985,

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shareholders' derivative suit against Zweifel and Lokey & Bowden based on any claims House of Travel may have had against them – he no longer had standing to prosecute such a suit. Second, any claim Pelletier brought against these lawyers would have to be based on their breach of a duty they owed to him. (As we recite *infra*, Pelletier, on January 23, 1986, sued Zweifel and Lokey & Bowden in state court claiming the breach of such a duty. In that suit, he alleged that Zweifel and Lokey & Bowden, as House of Travel's counsel, had a fiduciary duty to him, as a shareholder; that in representing the company they breached this duty; and that, as a result of such breach, he suffered substantial injury – in part through the depreciation in value of his House of Travel stock.) Third, Pelletier could sue Zweifel and Lokey & Bowden in House of Travel's name to recover damages for their breach of a duty owed to House of Travel if the Bankruptcy court granted him leave to do so.

Schlanger, representing Pelletier, submitted the Elite agreement to the Bankruptcy court on June 3, and requested the court to approve the provision giving Pelletier the right to sue Zweifel and Lokey & Bowden on behalf of House of Travel. Rickertsen opposed Schlanger's request, objecting to the manner in which Schlanger proposed to divide the proceeds of any recovery Pelletier might obtain. Rickertsen thought that House of

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Pelletier did not know that, on December 29, 1984 – when he made his deal with the Hurst Group – TI, not the Hurst Group, owned the shares the Hurst Group had acquired from Langston on October 14, 1984.

Travel's share was too small. Before the court could rule on the matter, Schlanger and Rickertsen worked out a new allocation: Pelletier would receive 66$^{2}/_{3}$% of any recovery, and House of Travel would receive 33$^{1}/_{3}$% Schlanger and Rickertsen submitted the new arrangement to the court for approval on October 2, 1985. The court set the matter down for a hearing on October 23, and when no party objected, the court approved it, in a written order, on October 24.

Neither Zweifel nor Lokey & Bowden received a copy of the October 24 order. Several weeks later, a member of the firm learned about it, and on January 13, 1986, Lokey & Bowden (1) moved the court to vacate the order, contending that it had not been given notice of the October 23 hearing – consequently, the order should not stand, and (2) objected to the court's confirmation of a plan that had been proposed for House of Travel's reorganization. Lokey & Bowden served a copy of its motion and its objection on Schlanger, as Pelletier's attorney, by hand the following day, January 14; the same day, the bankruptcy court scheduled a hearing on the matter for January 30, 1986.

Schlanger and Pelletier, realizing that the bankruptcy court might vacate the October 24 order and deny Pelletier permission to sue Zweifel and Lokey & Bowden in House of Travel's name, decided to sue them in Pelletier's name instead. Thus, on January 23, 1986, Schlanger, on behalf of Pelletier, filed a complaint against Zweifel and Lokey & Bowden in the Superior Court of Fulton County charging them with having breached a fiduciary duty they purportedly owed Pelletier. According to the complaint, Zweifel and Lokey & Bowden, as

House of Travel's counsel, "had a fiduciary duty to advance the best interests of [the company] and not to prefer the interest of one putative shareholder over that of another. Moreover, because [House of] Travel was a close corporation, the duties of Lokey & Bowden and Mr. Zweifel extended not only to the corporation as a whole, but to each of its shareholders." These attorneys, according to Schlanger's allegations, breached such duty by preferring the interests of Culpepper over those of Pelletier, to wit: Zweifel, after Pelletier had purchased the Hurst Group's House of Travel stock, advised Culpepper not to sign the management agreement that Culpepper had, prior to the purchase, told Pelletier that he would sign; Culpepper's refusal to sign the agreement caused Pelletier to suffer great injury – in particular, loss of shareholder equity and the litigation expenses Pelletier incurred in trying to resolve his dispute with Culpepper; Zweifel and Lokey & Bowden, in representing both Culpepper and House of Travel, had a conflict of interest and should have withdrawn; they did not, and instead, had Culpepper bring House of Travel to the bankruptcy court.[39] According to Pelletier, the conduct of Zweifel and his law firm injured him in an amount in excess of $1 million; he therefore sought compensatory damages in that amount. Pelletier also sought $2 million in punitive damages, alleging that the defendants intended to injure him.

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[39] Pelletier alleged other acts of misconduct on the part of Zweifel and Lokey & Bowden; such acts are subsumed by the allegations cited in the text above.

On January 24, the day after this suit was filed, Schlanger served on Lokey & Bowden Pelletier's memorandum in opposition to Lokey & Bowden's motion to vacate the October 24 order of the bankruptcy court. At the same time, Schlanger furnished Zweifel and the law firm a "courtesy copy" of the complaint Pelletier had filed against them in the superior court the day before.

On January 30, the bankruptcy court convened the hearing on Lokey & Bowden's motion to vacate the October 24 order and its objection to the confirmation of the plan to reorganize House of Travel. Present at the hearing were, among others, Robert Bartlett, counsel for Lokey & Bowden, Zweifel, who was there as a party (representing Lokey & Bowden), Schlanger, and Rickertsen. The court first considered the motion to vacate. Bartlett informed the court of the suit Pelletier had brought against Zweifel and Lokey & Bowden on January 23. Reminding the court that the firm had filed a claim, as an unsecured creditor, against the debtor's (House of Travel's) estate, he said that if Pelletier insisted on going forward with his suit, the law firm would have to amend its claim to include whatever expenses and losses it, and Zweifel sustained because of the litigation. According to House of Travel's bylaws, Bartlett explained, the law firm and Zweifel were entitled to indemnification for any losses they might suffer by reason of their representation of House of Travel. Bartlett therefore asked the court not to confirm the proposed plan of reorganization; rather, the court should defer its confirmation ruling until the law firm could decide whether an amendment of its unsecured claim would be necessary. When the court indicated that, even if it confirmed the plan, it would give Lokey & Bowden

the right to file an amended claim later, Bartlett withdrew his objection to confirmation. On February 4, 1986, the court, in a written order, confirmed the proposed plan of reorganization,[40] without prejudice to Lokey & Bowden's and Zweifel's right to file an amended, unsecured creditor's claim in the event they suffered any loss at the hands of Pelletier. The court also vacated its October 24 order, which meant that Pelletier could not sue Zweifel and Lokey & Bowden in House of Travel's name.

F. *The Case at Hand: Pelletier's RICO Suit.*

At the conclusion of the January 30 hearing, as Zweifel was leaving the courtroom, a process server presented him with the complaint in the instant case (the RICO suit); Schlanger had filed it, on behalf of Pelletier, in the district court that morning.

The complaint consisted of a chronological history of House of Travel and focused on three of the four stock transactions described above – the Langston/Hurst Group transaction of October 7, 1983; the Pelletier/Hurst Group transaction of December 29, 1984, and the

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[40] Under the plan, World Travel Advisors, a travel agency, paid $125,000 in cash to House of Travel and House of Travel's shareholders surrendered their shares, receiving nothing in return. House of Travel, as a means of liquidating itself, then formed a new company and transferred most of its assets to it; that company, in turn, was liquidated for the benefit of House of Travel's creditors. In sum, World Travel Advisors acquired House of Travel's name and the few assets that remained. After these transactions were concluded, Culpepper went to work for World Travel Advisors, as a vice president of the firm.

Pelletier/Elite transaction of May 4, 1985[41] – and House of Travel's chapter 11 proceeding in the bankruptcy court. Pelletier alleged that each of these transactions, and the chapter 11 proceeding, was the product of a scheme that Culpepper had devised in September 1983 (1) to induce his House of Travel coshareholder to sell and/or a third party to buy the coshareholder's House of Travel stock; (2) to induce the purchaser, after the stock changed hands, to obtain working capital for the company; and, then, (3) to bleed the company of its new working capital. According to the complaint, this is how Culpepper executed his scheme. First, whenever House of Travel fell into financial difficulties, Culpepper would look for an investor to replace his coshareholder and to obtain working capital for the company. When he found a good prospect, Culpepper would tout House of Travel as a good investment – that simply needed more working capital. Culpepper would explain that the company's lack of sufficient working capital was due to his coshareholders; misfeasance. When the prospect indicated an unwillingness to purchase a minority interest in the company, Culpepper would promise to give him effective control of the company by vesting him with the power to manage it. If this satisfied the prospect and he agreed to buy out the coshareholder and arrange for new working capital, Culpepper would induce his coshareholder to sell by convincing him that if he did not sell, he would lose his entire investment in House of Travel.

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[41] The complaint made no reference to the Hurst Group/TI transaction of November 1, 1984.

Culpepper, the complaint alleged, devised this scheme sometime prior to October 7, 1983, and he used it for the first time to get Langston to sell, and the Hurst Group to buy, 40 of his 50 House of Travel shares (i.e., 40% of the company). Culpepper purportedly convinced Langston that both of them should sell 40 shares to the Hurst Group, but only Langston completed the transaction. Culpepper, when House of Travel's financial condition subsequently deteriorated, executed his scheme again in December 1984; in an effort to salvage his investment, he allegedly induced Pelletier to buy out the Hurst Group and to obtain a line of credit for House of Travel. The inducement, according to the complaint, was Culpepper's promise to give Pelletier his, Culpepper's, authority to manage the company; after Pelletier bought the Hurst Group's interest, however, Culpepper reneged on his promise. Culpepper, allegedly executed his scheme for a third time on May 4, 1985, inducing Pelletier to sell to Elite the House of Travel shares he had acquired from the Hurst Group.

Zweifel and his law firm, according to the complaint, joined Culpepper's scheme, as coconspirators, in the fall of 1984, shortly before Pelletier purchased the Hurst Group's stock; they joined the scheme, the complaint said to protect and enhance the stream of income they had been receiving from House of Travel in the form of attorney's fees. Thereafter, Zweifel purportedly became aware of Pelletier's plan to purchase the Hurst Group's interest in House of Travel and Culpepper's intention to induce Pelletier to go forward with the purchase, and to obtain a line of credit for the company, by promising to give

Pelletier the authority to manage the company. On January 8, 1985, however, after Pelletier had purchased the Hurst Group's stock and obtained the line of credit, Zweifel counseled Culpepper to renege on his promise and thereby helped Culpepper maintain control over the company. When, in March 1985, the Superior Court of Fulton County, Georgia upheld the decision of House of Travel's board of directors (in which the Hursts, at Pelletier's direction, voted to replace Culpepper as House of Travel's president and Zweifel's law firm as its counsel), Zweifel, with the help of Donald L. Rickertsen, counseled Culpepper to file a chapter 11 petition, and thus put House of Travel in the hands of the bankruptcy court. Zweifel did this, it was alleged, to enable Culpepper to continue his control, at least temporarily, over House of Travel's affairs.

The complaint alleged that, while House of Travel was before the bankruptcy court, four other individuals and two corporations, in addition to Zweifel and his law firm, joined Culpepper's scheme, as coconspirators. They were Rickertsen, who represented House of Travel during the chapter 11 proceeding, Frank Carmines and Charles Crumley, the bankruptcy examiner and auditor, respectively, assigned to the chapter 11 case, Elite and its president, Joyce Carson, and House of Travel. Collectively, these coconspirators helped Culpepper get rid of Pelletier, as Culpepper's coshareholder in House of Travel, by fraudulently inducing Pelletier to sell his House of Travel stock to Elite. The fraud was principally this. Part of the consideration Pelletier received for the stock was House of Travel's assignment to Pelletier of any claims it may have had against Zweifel and Lokey & Bowden;

Pelletier could not sue on these claims, however, without the bankruptcy court's approval. Rickertsen and Carmines, acting for all of the coconspirators, promised Pelletier that they would not oppose the granting of such approval, but they did not intend to abide by their promise; when Pelletier, through Schlanger, petitioned the bankruptcy court for leave to sue, Rickertsen and Zweifel objected and the court sustained their objection. As a result, Pelletier was never able to sue Zweifel and Lokey & Bowden on House of Travel's claims, and, according to Pelletier, a substantial portion of the consideration he received for his House of Travel stock thus went for naught.

Pelletier alleged that the foregoing conduct rendered Zweifel liable to him for money damages on ten grounds, or counts. Count one alleged that Zweifel and his coconspirators had violated four federal RICO criminal provisions, 18 U.S.C. §§ 1962(a)-(d) (1988), and sought treble damages under RICO's civil remedies statute, 18 U.S.C. § 1964(c) (1988), for these violations. Section 1962(a) makes it a crime for anyone who has derived income from "a pattern of racketeering activity . . . in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise . . . engaged in . . . interstate- . . . commerce." Pelletier alleged that Zweifel violated section 1962(a) in that, while representing House of Travel and Culpepper as an attorney, he received such income and invested it in the operation of the following enterprises engaged in interstate commerce: House of Travel, Lokey & Bowden, and the Bankruptcy Court for

the Northern District of Georgia. The pattern of racketeering activity that allegedly generated the income, and in which Zweifel supposedly engaged, consisted of the criminal acts, called "predicate acts," of mail,[42] wire,[43] securities,[44] and bankruptcy[45] fraud; using interstate facilities to further an unlawful activity;[46] extortion under color of official right;[47] state law barratry;[48] state law false statements;[49] and witness tampering, in violation of both federal and state law.[50]

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[42] 18 U.S.C. § 1341 (1988) (making it a crime to use the mails in furtherance of a scheme to defraud).

[43] 18 U.S.C. § 1343 (1988) (making it a crime to use wire, radio, or television communications in furtherance of a scheme to defraud).

[44] The complaint did not specify which federal securities laws Zweifel and Culpepper allegedly violated.

[45] 18 U.S.C. § 152 (1988) (making it a crime knowingly or fraudulently to make a false declaration, certification, verification, or statement in connection with a bankruptcy proceeding).

[46] 18 U.S.C. § 1952 (1988) (generally dealing with activities such as unlawful gambling, transportation of alcohol, narcotics, prostitution, extortion, arson, and bribery).

[47] 18 U.S.C. § 1951 (1988) (making it a crime to interfere with interstate commerce through the wrongful use of threats made under color of official right).

[48] Ga.Code Ann. § 16-10-95 (1988) (making it a crime knowingly to stir up groundless litigation).

[49] Ga.Code Ann. § 16-10-20 (1988) (making it a crime to make a false statement in any matter within the jurisdiction of any state agency or department).

[50] 18 U.S.C. § 1503 (1988) (making it a crime to impede any juror or officer of the court from performing his duties); Ga.Code Ann. § 16-10-93 (1988) (making it a crime to deter a witness from testifying truthfully and freely).

Section 1962(b) imposes criminal liability on anyone, who "through a pattern of racketeering activity . . . acquire[s] or maintain[s], directly or indirectly, any interest in or control of any enterprise . . . engaged in . . . interstate . . . commerce." Pelletier alleged, in count one, that Zweifel, through the predicate acts described above, maintained an interest in or control of the same three enterprises: House of Travel, Lokey & Bowden, and the bankruptcy court.

Section 1962(c) makes it a crime for any person "employed by or associated with any enterprise engaged in . . . interstate . . . commerce . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Pelletier alleged that Zweifel, while employed or associated with House of Travel, Lokey & Bowden, and the bankruptcy court conducted or participated in the conduct of their affairs through the commission of the predicate acts described above.

Section 1962(d) makes it a crime for anyone to conspire to violate the substantive offenses of sections 1962(a)-(c). Pelletier alleged that Zweifel's conduct, as described in the complaint, violated this conspiracy provision. Pelletier, however, did not point to the particular conduct that constituted a violation of section 1962(d). Rather, in alleging this RICO violation – and those above (sections 1962(a), (b), and (c)), Pelletier simply left it to the reader to discern which allegations of fact gave rise to Zweifel's liability under RICO.

Counts two through nine of Pelletier's complaint sought money damages for several predicate acts that

allegedly gave rise to the count one RICO violations. Count two of Pelletier's complaint alleged that Zweifel, in counseling Culpepper to renege on his promise to transfer managerial control over House of Travel's affairs to Pelletier and in failing to inform Pelletier of the extent of the Hurst Group's misappropriation of the company's funds, committed securities fraud in violation of 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990) (hereinafter Rule 10b-5).[51] Counts three, four, and five alleged that Zweifel, by engaging in such conduct, also committed securities fraud in violation of 15 U.S.C. §§ 77*l*(1), (2)[52] and 77q(a),[53] and the Georgia code, Ga.Code Ann. § 10-5-12 (1989),[54] and count six alleged that, by engaging in such conduct, he committed common law fraud. Count seven alleged that Zweifel breached his fiduciary duty to Pelletier, as a House of Travel shareholder (in essence, the same claim Pelletier raised in the state court suit he filed against Zweifel and Lokey & Bowden on January 23, 1986). Count eight alleged that Zweifel had committed state law barratry,[55] presumably

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[51] These provisions prohibit the use of any fraudulent or manipulative device in connection with the purchase or sale of a security.

[52] This provision prohibits any person who sells or offers to sell a security from knowingly using any false statement in any communication made in connection with the sale or offer to sell.

[53] This provision prohibits essentially the same conduct as prohibited by 15 U.S.C. § 78j(b) and Rule 10b-5.

[54] This provision is the state law equivalent of section 78j(b) and Rule 10b-5.

[55] *See supra* note 48.

by advising Rickertsen that Culpepper was still House of Travel's president and had authority to file a chapter 11 petition on its behalf. Count nine alleged that Zweifel made false statements,[56] presumably to the state superior court (in Pelletier's, and Langston's, shareholders' derivative suit or in the Hurst Group's suit for specific performance) and in an affidavit he signed with respect to the Culpepper-Langston-Hurst Group transaction. Finally, in count ten, Pelletier alleged that Zweifel injured him through state law racketeering activity in violation of Ga. Code Ann. § 16-14-1 *et seq.* (1988).[57]

Zweifel, on February 20, moved the court to dismiss Pelletier's RICO suit for failure to state a claim for relief or, alternatively, to require Pelletier to file a more definite statement, contending that Pelletier's allegations were so muddled that he could not frame a responsive pleading.[58] The next day, February 21, Zweifel and Lokey & Bowden removed Pelletier's state court suit (brought on January 23) to the federal district court, contending that the suit involved a matter pending in the bankruptcy court and thus, under 28 U.S.C. § 1334 (1988), fell within the district

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[56] *See supra* note 49.

[57] These provisions are essentially identical to the federal RICO provisions.

[58] Zweifel observed in his alternative motion that all of Pelletier's claims were based on fraud and that the fraud had not been pled with the particularity required by Fed.R.Civ.P. 9(b). Zweifel asked the court to dismiss Pelletier's claims for this reason. In such a situation, however, the rules contemplate a repleader, not a dismissal; hence, we treat Zweifel's alternative motion as requesting a more definite statement under Fed.R.Civ.P. 12(e) rather than a dismissal.

court's subject matter jurisdiction. Then, on February 28, they answered Pelletier's complaint in that suit. In their answer, they alleged that Pelletier was not, and had never been, a House of Travel shareholder;[59] therefore, he could not recover from them on the theory that their conduct depreciated his ownership interest in the company. They alleged, alternatively, that, assuming that Pelletier had been a House of Travel shareholder during the relevant period, they could not be liable to him for breaching the fiduciary duty described in his complaint because no such duty existed under Georgia law.[60] Accordingly, as a

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[59] Pelletier's complaint was ambiguous with respect to his ownership of House of Travel stock; he alleged that he had acquired such stock from the Hurst Group, but he did not indicate whether he still owned the stock or, if he did not, when he parted with it.

[60] It is a black letter principle of corporation law that a corporation's counsel does not owe the fiduciary duty Pelletier described to the corporation's shareholders. *See* 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 839, at 204 (rev.ed.1986); this principle, that a corporation's attorney owes no such fiduciary duty to the corporation's shareholders, applies both to close and publicly traded corporations. *See Egan v. McNamara*, 467 A.2d 733, 738-39 (D.C.Ct.App.1983). In sum, if Zweifel and Lokey & Bowden breached a fiduciary duty while representing House of Travel, it was a duty owed to House of Travel, not Pelletier. Under Georgia law, House of Travel, alone, had the right to sue; as the Supreme Court of Georgia has stated, "the right of action for wrongs suffered by the corporate interests is in the corporation, and an action for such wrongs cannot be maintained by a stockholder, however injuriously it may affect him." *Smyly v. Smith*, 216 Ga. 529, 118 S.E.2d 188, 189 (1961); *see Dale v. City Plumbing & Heating Supply Co.*, 112 Ga.App. 723, 146 S.E.2d 349, 354 (1965). The Georgia Supreme Court has recognized a narrow exception to

(Continued on following page)

separate affirmative defense, Zweifel and Lokey & Bowden alleged that the complaint failed to state a claim for relief.

The same day, February 28, that Zweifel and Lokey & Bowden filed this answer to Pelletier's state court complaint (which they had removed to the district court), the district court heard the alternative motions Zweifel had

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this general rule: if the reasons underlying the rule are not present in a particular case, then an aggrieved shareholder may be allowed to proceed directly against the alleged wrongdoer. *See Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49, 51 (1983). A trial judge should, according to the Georgia Supreme Court, answer four questions in the affirmative before invoking the exceptions: (1) would a derivative suit prevent a multiplicity of suits? (2) would a derivative suit protect creditors by recovering funds for the corporation? (3) would a derivative suit protect other shareholders by increasing the value of the shares? and (4) would the aggrieved shareholder be compensated by a derivative action that led to an increase in the value of his shares? *Id.* In Pelletier's case, a trial judge could not answer yes to each of these questions; thus, it is clear that Pelletier could not have fallen within the limited class of shareholders allowed to proceed directly against a wrongdoer based on the corporation's claim.

In seeking to recover for wrongs suffered by the corporation, the shareholder must follow the procedures applicable to shareholders' derivative suits. The person complaining must be a shareholder (which Pelletier was not when he brought the state court action against Zweifel and Lokey & Bowden), Ga.Code Ann. § 14-2-741 (1989), and must have made a written demand on the corporation to take suitable action (which Pelletier did not do), *id.* § 14-2-742. In essence, then, the suit Pelletier brought against Zweifel and his law firm was a shareho.. ers' derivative suit; he brought it, though, without satisfying any of the conditions precedent to bringing such an action.

addressed to Pelletier's RICO suit. When the hearing began, District Judge G. Ernest Tidwell, to whom the case had been assigned, told Schlanger, who was there for Pelletier, that he was "treading on mighty dangerous grounds"; he then asked Schlanger if he was "familiar with Rule 11." Schlanger replied that he was familiar with the Rule and did not think he was violating it. He said, "we have got more facts on this case than any . . . RICO case I know that's been filed in this court." The court countered this statement by observing that the pivotal allegations of Pelletier's complaint constituted nothing more than bald conclusions and that, if Schlanger wanted to pursue the case, he would have to amend his complaint. As the hearing progressed, Judge Tidwell indicated that his respect for Hamilton Lokey was such that he might not be able to be fair to Pelletier; accordingly, he said that he would probably recuse himself. He did so on March 3, without ruling on Zweifel's motion to dismiss, and the case was assigned to District Judge Orinda D. Evans. She presided over the case to its conclusion.

On March 19, Zweifel and Lokey & Bowden moved the district court for judgment on the pleadings in the state court suit they had removed to federal court, i.e., they asked the court to decide the case on the basis of their affirmative defense of failure to state a claim for relief. Before the court could issue a ruling, however, Pelletier moved the court to remand the proceedings to the state court.

On April 7, Schlanger filed an amended complaint, the complaint now before us, in Pelletier's RICO suit. The new complaint was seventy pages long and incorporated by reference four large volumes of evidentiary exhibits.

The amended complaint replicated, in substance, the allegations in Pelletier's original complaint. As before, however, Schlanger did not connect his factual allegations with his legal conclusions. Framed in eight counts, the amended complaint repled eight of the ten counts of the original complaint; counts six and seven of the original complaint, asserting common law fraud and breach of fiduciary duty claims, had been dropped, and counts eight, nine and ten of the original complaint became counts six, seven, and eight of the amended complaint. On April 18, Zweifel moved the court to dismiss the amended complaint for failure to state a claim for relief or, alternatively, to require Pelletier to file a more definite statement.[61]

On April 24, 1986, while he was preparing his memorandum in opposition to Zweifel's motion to dismiss Pelletier's amended complaint in the RICO case, and while the district court was considering Zweifel's and Lokey & Bowden's motion for judgment on the pleadings in the removed state court action, Schlanger returned to the bankruptcy court and House of Travel's chapter 11 proceeding and filed an "Application to Permit the Pursuit of Certain Claims and Causes of Action." In this application, he represented that House of Travel had some meritorious malpractice claims against Zweifel and Lokey & Bowden and asked the court to allow Pelletier to pursue them in another forum. Schlanger also proposed a new allocation of any recovery that might result: 60% would go to Pelletier and 40% to House of Travel. (The original Elite agreement, as noted *supra*, had provided

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[61] *See supra* note 58.

that Pelletier would receive 70%, House of Travel 20%, and Elite 10% of any recovery Pelletier obtained.) The bankruptcy court advised Schlanger that it would not rule on his application until it could assess the strength of House of Travel's claims against the lawyers. To assist it in making such an assessment, the court appointed an attorney, John J. Goger, to examine the claims and to determine whether granting the application would be in the best interest of the debtor's estate.

On September 22, 1986, Pelletier's litigation against Zweifel – his removed state court action against Zweifel and Lokey & Bowden and his RICO suit against Zweifel – was once again divided when Judge Evans, granting Pelletier's motion to remand, sent Pelletier's suit against Zweifel and Lokey & Bowden back to state court. In remanding the case, she left undecided the defendants' motion for judgment on the pleadings (based on their affirmative defense of failure to state a claim for relief) and directed them to present the motion to the state court. They did so, and the state court denied the motion.

On October 2, 1986, in the RICO case, Judge Evans heard argument on Zweifel's alternative motions to dismiss or for a more definite statement and took them under advisement. That same day, Goger, having finished the task the bankruptcy court had given him, presented his findings to the court. As noted, Goger had been told to evaluate the claims that Schlanger contemplated bringing against Zweifel and Lokey & Bowden. He focused, in particular, on Schlanger's claim that Zweifel had fraudulently induced Pelletier to purchase the Hurst Group's House of Travel shares, on December 29, 1984, by persuading Culpepper not to enter into the management

agreement Culpepper had told Pelletier that he would sign. Goger also examined Schlanger's claims that Zweifel and his firm had engaged in abusive litigation tactics in defending House of Travel in Pelletier's (and Langston's) shareholders' derivative suit; that Zweifel had, without cause, prevented the sale of House of Travel's assets to willing purchasers; that Zweifel had prevented Culpepper and Pelletier from settling their differences; and that Zweifel and Lokey & Bowden had committed bankruptcy fraud by having Culpepper file an unauthorized chapter 11 petition in behalf of House of Travel. After a thorough review of the evidence, Goger concluded, and reported to the bankruptcy court, that "there does not appear to be substantial justification for a lawsuit against [Zweifel and] Lokey & Bowden asserting an entitlement to damages for alleged negligence and breaches of fiduciary duties." Goger referred the court to Fed.R.Civ.P. 11 and stated that, "[w]hile any litigation presents uncertainties, and the discovery of new facts is certainly possible, the possibility of affirmative recovery in the instant case is sufficiently remote, and the possibility of an award under Rule 11 . . . is sufficiently great that the pursuit of the asserted claims of [House of Travel] against Lokey & Bowden should not be undertaken." Goger therefore recommended that the court deny Pelletier's application.

Schlanger, of course, and Pelletier, received a copy of Goger's report. They objected to Goger's recommendation, and the court held a hearing on whether to grant Pelletier's application. Schlanger appeared at the hearing and argued in support of the application. Goger, in response, defended his recommendation. He repeated the

statement he had made in his report about the possibility of Rule 11 sanctions if Pelletier sued Zweifel and Lokey & Bowden; in Goger's opinion, the risk of sanctions counseled against the bringing of suit. The bankruptcy court agreed, and denied Pelletier's application on December 3, 1986.

On January 9, 1987, Judge Evans ruled on Zweifel's alternative motions – for dismissal or for a more definite statement – in the RICO case. The court dismissed counts three, four, six, seven, and eight for failure to state a claim for relief: count three, a federal securities claim under 15 U.S.C. §§ 77l(1), (2), did not state a claim for relief since an indispensable element of that claim was that the defendant sold securities – yet neither Zweifel nor his clients sold securities to Pelletier; counts four, securities fraud in violation of 15 U.S.C. § 77q(a), six, state law barratry, and seven state law false statements, failed because the statutory provisions they relied upon did not create private rights of action; and count eight, the Georgia RICO claim, because Pelletier had not pled any predicate acts of racketeering. Finally, the court struck from count one, as immaterial or as insufficient, all references to the predicate acts of extortion, barratry, false statements, and witness tampering. Judge Evans did not grant Pelletier leave to replead any of these counts, and Pelletier did not ask her to amend her order to allow him to do so.[62]

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[62] Pelletier could not have cured counts three, four, six, and seven; the elements necessary to state those claims were simply missing. He may have been able, however, to cure the deficiency in count eight by alleging some predicate acts of racketeering activity – if, in fact, Zweifel had committed one or more of them.

Seven months later, on August 7, 1987, Pelletier moved for leave to file a second amended complaint. The proposed complaint strengthen his Georgia RICO claim by alleging several predicate acts of racketeering. It deleted, however, all reference to his federal securities claims under 15 U.S.C. § 77l and 77q, and dropped the false statements and barratry counts (although they were retained as predicate acts for the Georgia RICO claim). Pelletier also sought to assert a new claim – the claim he had brought against Zweifel (and Lokey & Bowden) in the state superior court on January 23, 1986.

That same day, August 7, Zweifel moved for summary judgment on the remaining counts of the amended complaint: count one (the RICO claim based on Zweifel's alleged violations of subsections (a) through (d) of section 1962), count two (the securities fraud claims under section 78j(b) and Rule 10b-5), and count five (the securities fraud claims under Georgia's equivalent of Rule 10b-5).

In October 1987, while his motion for summary judgment was pending in the district court, Zweifel discovered that the Hurst Group did not have any House of Travel stock to sell to Pelletier on December 29, 1984; it had already sold all of its House of Travel shares to TI. Armed with this information, Zweifel moved the district court for leave to file a supplemental affidavit in support of his motion for summary judgment and to engage in further discovery. (At the same time, Zweifel and Lokey & Bowden, relying on Zweifel's discovery of the Hurst Group's sale to TI, moved the state court for summary judgment in Pelletier's tort action against them. The court denied their motion, and they appealed. *See infra*, slip op. at 1633, at ___.) In his motion, Zweifel asserted that

Pelletier never owned any House of Travel shares and, consequently, could not prevail on any claims whose sufficiency depended on Pelletier's ownership of such stock. The district court granted Zweifel's motion observing that the Hurst Group's sale to TI was "highly material" to Pelletier's claims against Zweifel.

On January 6, 1988, Judge Evans denied Pelletier's motion for leave to file a second amended complaint, noting that Pelletier had delayed too long before he moved to amend – a full seven months since she had entered the dismissal order. Judge Evans also observed that the new state law claim that Pelletier wished to bring was still being litigated in state court and that if he wished to bring this claim in federal court he should have brought it in his original complaint as a pendent claim. (Pelletier does not challenge this ruling in his present appeal; rather, he stands on the allegations in his amended complaint.)

On August 11, 1988, the district court granted Zweifel's motion for summary judgment, dismissing the remaining counts of Pelletier's amended complaint – counts one, two and five – and entered final judgment for Zweifel. The court granted the motion because the record simply failed to establish that Zweifel committed any of the fraudulent acts charged in these counts. The court's approach assumed that all of the fraudulent acts were actionable – there simply was no evidence of Zweifel's knowing participation in them. After the district court had disposed of Pelletier's case, Zweifel moved the court to impose sanctions, under Fed.R.Civ.P. 11, against Pelletier and his attorney, Schlanger.

On April 24, 1989, before the district court could rule on Zweifel's Rule 11 motion, Pelletier took an appeal, No. 89-8334, from the district court's final judgment dismissing his case. While his appeal was being briefed, the Georgia Court of Appeals decided the appeal in Pelletier's tort action against Zweifel and Lokey & Bowden. *See Lokey & Bowden v. Pelletier,* 192 Ga.App. 470, 385 S.E.2d 90 (1989). The court held that the appellant attorneys were entitled to summary judgment against Pelletier since the evidence demonstrated as a matter of law that Pelletier was never a House of Travel shareholder; TI owned the shares the Hurst Group supposedly sold him on December 29, 1984, and did not rescind its purchase of those shares until it provided written notice to the Hurst Group on March 12, 1985. Pelletier petitioned the Supreme Court of Georgia to issue a writ of certiorari setting aside the court of appeals' decision, but the supreme court denied his petition on September 7, 1989.

On July 10, 1989, the district court denied Zweifel's Rule 11 motion for sanctions, and Zweifel appealed, No. 89-8667. We thereafter granted the parties' motions to consolidate the appeal with the appeal in No. 89-8334. We now affirm the district court's final judgment in No. 89-8334. We reverse its order in No. 89-8667 denying Rule 11 sanctions, and remand the case so that sanctions may be imposed.

II.

In his appeal, Pelletier challenges the district court's summary disposition, under Fed.R.Civ.P. 56, of counts one (federal RICO), two (federal securities fraud), and

five (state securities fraud) of his amended complaint, and its dismissal, under Fed.R.Civ.P. 12(b)(6), of counts six (state law barratry), seven (state law false statements), and eight (state RICO) of that complaint. We now address Pelletier's challenges to these counts.

A.

Section 1964(c) of title 18 of the United States Code, the federal civil RICO provision, provides that "[a]ny person injured in his business property by reason of a violation of [18 U.S.C. §] 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964 (1988). Sections 1964(a), (b) and (c) of title 18 make criminally liable those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).[63]

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[63] Section 1962 provides in full:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly,

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Pelletier contends that he has made out a case against Zweifel in count one, sufficient to withstand summary

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from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs

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judgment, under each of section 1962's substantive provisions, subsections (a), (b), and (c). That is to say, the record shows that Zweifel committed, or aided and abetted Culpepper in committing, a pattern of racketeering activity – namely mail, wire, securities, and bankruptcy fraud – which affected an enterprise engaged in interstate commerce – namely House of Travel and Lokey & Bowden [64] – in a manner described in subsections (a), (b), and (c) of section 1962. Pelletier also contends that he established a case against Zweifel under subsection (d).

We conclude that Pelletier has no case under any of the section 1962 subsections because he has failed to establish the element indispensable to criminal liability under those subsections – a pattern of racketeering activity. In particular, Pelletier has failed to establish that Zweifel committed, or aided and abetted, even a single act of racketeering which "injured his business or property" as required by section 1964(c) as a condition precedent to civil liability.[65]

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through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

[64] In his original complaint, Pelletier alleged that the Bankruptcy Court for the Northern District of Georgia also was an enterprise within the meaning of the RICO statutes. He abandoned this allegation when he filed his amended complaint.

[65] In the present case, we need not decide whether the record supports an inference that the alleged cooperation

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1.

An act of racketeering, commonly referred to as a "predicate act," is defined to include, *inter alia*, acts of mail and wire fraud, bankruptcy fraud, and fraud in the sale of securities. 18 U.S.C. § 1961(1) (1988). A "pattern" of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986).

Predicate acts are related if they " 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *See Sedima*, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285 n. 14 (quoting 18 U.S.C. § 3575(e) (1988)).[66] In other words, if Pelletier is to succeed on his federal RICO claim then he must show that Zweifel engaged in a pattern of acts involving mail fraud, 18 U.S.C. § 1341, wire fraud, *Id.* § 1343, bankruptcy fraud, *id.* § 152, or securities fraud, 15

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between Zweifel and Culpepper constituted an "enterprise"; Pelletier's case fails because there simply is no evidence in the record from which we can infer that Zweifel committed, or aided and abetted the commission of, *any* predicate acts or that, assuming Zweifel did so, Pelletier suffered injury by reason of those acts.

[66] Although it is questionable whether some of the predicate acts alleged by Pelletier are "related" for purposes of section 1962, we need not reach that issue since Pelletier's RICO claim fails for more fundamental reasons.

U.S.C. § 78j(b), Rule 10b-5, or that Zweifel aided and abetted Culpepper in the commission of these acts, *see Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47-48 (2d Cir.), *cert. denied*, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 698 (1978).[67]

Private litigants can recover for racketeering injuries under 18 U.S.C. section 1964(c), but their injury must "flow from the commission of the predicate acts." *Sedima*, 473 U.S. at 497, 105 S.Ct. at 3285. This means that a private plaintiff who wants to recover under civil RICO must show some injury flowing from one or more predicate acts. A plaintiff cannot allege merely that an act of racketeering occurred and that he lost money. He must show a causal connection between his injury and predicate act. If no injury flowed from a particular predicate act, no recovery lies for the commission of that act.

2.

As noted, Pelletier contends that the record establishes Zweifel's involvement in four predicate acts: bankruptcy fraud, mail fraud, wire fraud, and securities fraud.[68] We address these predicate acts in turn.

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[67] If, however, Pelletier could show that Zweifel conspired with Culpepper, pursuant to section 1962(d), to commit a pattern of racketeering activity, he could recover treble damages if Culpepper, in furtherance of the conspiracy, committed a single predicate act that injured him.

[68] Pelletier also alleged as a predicate act that Zweifel used interstate facilities to further an unlawful activity, in

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a.

According to Pelletier, Culpepper committed bankruptcy fraud when he signed and filed the chapter 11 petition without authority because the board of directors had removed him from his position as president of House of Travel. Moreover, Pelletier alleges, Zweifel knew that Culpepper was no longer president and that he did not have authority to file the petition. Nevertheless, Zweifel counseled Culpepper to proceed, representing to Rickertsen, the bankruptcy attorney, that Culpepper was still president. We accept these allegations as true. Culpepper signed, under penalty of perjury, the petition as president of House of Travel.

A person commits bankruptcy fraud if he "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury . . . in or in relation to any case under title 11." 18 U.S.C. § 152. We assume, without deciding, that Culpepper might have committed bankruptcy fraud by signing the petition as president, knowing that he no longer

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violation of 18 U.S.C. § 1952. Section 1952 prohibits the use of interstate facilities to distribute the proceeds of, or further, an "unlawful activity." As we note above, *see supra* note 46, however, section 1952(b) defines an "unlawful activity" as an illegal business enterprise involving gambling, liquor, narcotics, prostitution, extortion, bribery, arson, money laundering, or a failure to comply with certain financial reporting requirements. As the district court observed, Pelletier has not alleged that Zweifel or Culpepper had engaged in any "unlawful activity." Section 1952 therefore provides no basis for a predicate act in this case.

occupied that position.[69] We further assume that Zweifel knowingly aided and abetted Culpepper's commission of bankruptcy fraud.

Even if Zweifel committed bankruptcy fraud, Pelletier still has not shown that he was injured by reason of this predicate act. Only one week after Culpepper filed the chapter 11 petition, the Hurst Group through Schlanger (Pelletier's lawyer) agreed to ratify the filing, causing the bankruptcy court to treat the Hurst Group's motion to dismiss the case as withdrawn and to go forward with the bankruptcy proceeding. In fact, Pelletier expressly consented to the bankruptcy court's treatment of the Hurst Group's motion to dismiss. Had the Hurst Group prosecuted its motion to dismiss and the court found that Culpepper was not president of the company and thus lacked authority to file the petition, then the court would have dismissed the petition. Consequently, the Hurst Group's, and Pelletier's decision to ratify the petition was the proximate cause of the bankruptcy court's continued control over House of Travel. *Cf. In re Valles Mechanical Indus.*, 20 B.R. 355, 356 (Bankr.N.D.Ga. 1982) (board of directors may ratify unauthorized petition filed by president of company).

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[69] This assumption is based on several tenuous subsidiary assumptions: (1) that the board of directors meeting at which Culpepper was fired was properly noticed and called; (2) that Culpepper knew the meeting was proper; (3) that the resolution firing Culpepper was valid; (4) that Culpepper knew the resolution was valid; and (5) that Culpepper not only knowingly, but also *fraudulently*, declared that he was president of the company. Again, for the sake of showing that Rule 11 sanctions are justified, we make these assumptions in Pelletier's favor.

Moreover, Pelletier has not presented any evidence from which we could infer that House of Travel was a solvent and going concern when Culpepper filed the petition. Indeed, the record clearly discloses that the company was insolvent. Thus, we are simply at a loss to understand how a stockholder could be injured when his insolvent company is placed under the protection of chapter 11. A reorganized company is certainly worth more to a stockholder than an insolvent one.[70]

We hold that Pelletier would be incapable of proving at trial that the alleged bankruptcy fraud proximately caused him injury.[71] Accordingly, Zweifel was entitled to summary judgment on this point as well.

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[70] Pelletier also alleges that Culpepper, with Zweifel's advice, *attempted* to pay his attorneys with House of Travel funds just prior to bankruptcy and that, after bankruptcy, he sought to give Lokey & Bowden airline tickets in partial payment for their fees. Unless Culpepper carried out these depredations, an allegation Pelletier does not make, we fail to see how Pelletier suffered injury by reason of them. In any case, there is no evidence that Zweifel participated in, or aided and abetted, any of Culpepper's conduct.

[71] On the day after the January 8 meeting with Culpepper and Zweifel, Pelletier wrote to his litigation attorney, Peter Q. Bassett, regarding the strategy to take in light of the preceding day's events. Pelletier told Bassett to do several things, including, "[a]s economic pressure, hav[ing] several of the corporate lenders place [House of Travel] in default." Assuming that the bankruptcy fraud allegation did go to trial, we wonder how Pelletier would explain to the jury that he was injured by the filing of the chapter 11 petition when he was attempting to drive House of Travel at least to the brink of bankruptcy.

b.

The elements of mail and wire fraud are identical, *Carpenter v. United States*, 484 U.S. 19, 25 n. 6, 108 S.Ct. 316, 320 n. 6, 98 L.Ed.2d 275 (1987); therefore, we consider these predicate acts together. Mail or wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wire in furtherance of that scheme. *United States v. Downs*, 870 F.2d 613, 615 (11th Cir. 1989).

A scheme to defraud need not be carried out to constitute a violation of the mail and wire fraud statutes. These statutes punish unexecuted, as well as executed, schemes. *See Durland v. United States*, 161 U.S. 306, 313-15, 16 S.Ct. 508, 511-12, 40 L.Ed. 709 (1896); *Shale v. United States*, 388 F.2d 616, 618 (5th Cir.), *cert. denied*, 393 U.S. 984, 89 S.Ct. 456, 21 L.Ed.2d 445 (1968).[72] This means that the government can convict a person for mail or wire fraud even if his targeted victim never encountered the deception – or, if he encountered it, was not deceived. Instead, the court uses a reasonable person test to determine whether, if the scheme had been executed, the intended victim would have acted on the misrepresentations: were the misrepresentations "reasonably calculated to *deceive* persons of ordinary prudence and comprehension." *United States v. Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973), *cert. denied*, 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974); *see United States v. Netterville*, 553 F.2d 903, 909

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[72] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

(5th Cir. 1977), *cert. denied*, 434 U.S. 861, 1009, 98 S.Ct. 189, 719, 54 L.Ed.2d 135 (1978).[73]

This does not mean, however, that we look at a defendant's actions in the abstract; as the words "deceit" and "scheme" imply, the government must show, not only that the defendant's actions would have deceived a reasonably prudent person, but also that the defendant had the requisite mens rea. As this court has held, the defendant must have "had a 'conscious knowing intent to defraud.' " *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980) (quoting *United States v. Kyle*, 257 F.2d 559, 564 (2d Cir. 1958), *cert. denied*, 358 U.S. 927, 79 S.Ct. 312, 3 L.Ed.2d 301 (1959)); *see also Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637 (11th Cir. 1990). This mens rea element dictates, in practice, that the perpetrator of the scheme *anticipate* reliance. A defendant cannot possibly intend to deceive someone if he does not believe that his intended "victim" will act on his deception. Mail and wire fraud, just like common law fraud, thus entail "[a]n intention to induce the [victim] to act or to refrain from action in reliance upon the misrepresentation." *See* Prosser and Keeton on Torts 728 (5th ed. 1984) (reciting the elements of common law fraud).

When a private plaintiff relies on a violation of the mail or wire fraud statutes as a predicate act for civil RICO, he faces an additional hurdle before he can obtain

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[73] A scheme's success, or lack thereof, is relevant, however, to the issue of intent to defraud. *See United States v. Pearlstein*, 576 F.2d 531, 542 (3d Cir. 1978); *United States v. Meyer*, 359 F.2d 837, 839-40 (7th Cir.), *cert. denied*, 385 U.S. 837, 87 S.Ct. 85, 17 L.Ed.2d 71 (1966).

recovery: he must show not only that the mail or wire fraud statutes have been violated, but also that he has suffered injury as a result of the violation. Section 1964(c) provides civil remedies to those persons who are injured "by reason of" racketeering activity. As we note above, when the government prosecutes a defendant under the mail and wire fraud statutes, it is not required to show that the intended victim was actually deceived and suffered injury. *See Durland*, 161 U.S. at 313-15, 16 S.Ct. at 511-12; *United States v. Dynalectric Co.*, 859 F.2d 1559, 1576 (11th Cir. 1988). A civil RICO plaintiff must show, however, that he was injured by reason of the defendant's acts of deception. As the Supreme Court stated in *Sedima*, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." 473 U.S. at 496, 105 S.Ct. at 3285. The Court went on to hold that the plaintiff's damages must "flow from the commission of the predicate acts." *Id.* at 497, 105 S.Ct. at 3285. Section 1964(c), as interpreted by the Supreme Court and lower courts, thus imposes a proximate cause requirement: the plaintiff's injury must have been proximately caused by the commission of the predicate acts. *See Zervas v. Faulkner*, 861 F.2d 823, 934-35 (5th Cir. 1988); *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988); *Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988).

There is some question whether this proximate cause requirement limits damages recoverable to those caused directly by the predicate act (e.g., by reliance on fraudulent misrepresentations) or to those caused indirectly by the predicate act (e.g., by purchasing property at a price that has been artificially inflated by a scheme to defraud).

See Zervas, 861 F.2d at 833; *Boesky*, 849 F.2d at 63-64. *But see Nodine v. Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 810 (7th Cir. 1987). We have taken the more restrictive view, holding that a plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts. *See Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987). This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme. *See O'Malley v. O'Neill*, 887 F.2d 1557, 1563 & n. 9 (11th Cir. 1989) (citing *Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987)), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990); *see also Grantham & Mann, Inc. v. American Safety Prods., Inc.*, 831 F.2d 596, 606 (6th Cir. 1987). *But see O'Malley*, 887 F.2d at 1564 (Anderson, J., specially concurring) (disagreeing with the holding of *Morast*). Thus, we must examine the scheme Pelletier alleges and determine whether any evidence supports the allegations that Culpepper devised it, that Zweifel participated in it, and that Pelletier was injured by it.

i.

Under the mail and wire fraud statutes, a plaintiff only can show a scheme to defraud if he proves that some type of deceptive conduct occurred. Pelletier alleged in his complaints that in furtherance of Culpepper's scheme to fleece investors, Culpepper made false or misleading statements:

(a) In 1983, to Leroy Langston to induce him to sell some of his stock to the Hurst group;

(b) In 1984, to Mr. Pelletier in connection with the sale by the Hurst group to Mr. Pelletier of the stock they had purchased from Mr. Langston;

(c) In 1985, to Mr. Pelletier to induce Mr. Pelletier to sell his stock to Elite Travel, Inc.

Zweifel, while not making the misrepresentations to Pelletier, is alleged to have conspired with Culpepper to perpetrate the scheme.[74]

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[74] The misrepresentations allegedly made in connection with (1) the Hurst Group's purchase of 40 House of Travel shares from Langston, and (2) Elite's purchase of Pelletier's shares, do not merit extended textual treatment.

With regard to the Langston transaction, even assuming that Culpepper misrepresented his intent to turn over his stock to the Hurst Group, Pelletier makes no allegation that Zweifel conspired with Culpepper prior either to the communication of the misrepresentation or the sale. Even if he had, however, Pelletier suffered no injury as a result of that misrepresentation. Civil RICO requires a showing of injury; and this is fatal to Pelletier's claim. (Nor can Pelletier plead this misrepresentation solely to establish a *pattern* of predicate acts since Pelletier makes no allegation that Zweifel counseled Culpepper to make it.)

Pelletier also alleges that Culpepper induced him to sell his House of Travel shares to Elite. Again, however, there is no competent evidence of Zweifel's involvement in this scheme. In fact, the Elite transaction was completely contrary to Zweifel and Lokey & Bowden's interest. The Elite transaction included a proposed assignment to Pelletier of the right to litigate House of Travel's claims against Zweifel and Lokey & Bowden and a method of dividing the recovery from the suit if

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The crux of the scheme, as alleged by Pelletier, was Culpepper's promise to transfer financial control to Pelletier in order to induce Pelletier to purchase the Hurst Group's stock. Yet Pelletier's allegations of mail and wire fraud based upon this scheme fail for four independent reasons. First, the doctrine of res judicata bars Pelletier's claim that Culpepper induced Pelletier to purchase the Hurst Group's stock by promising to transfer financial control of House of Travel to him. Second, there is no evidence from which a jury could infer that Culpepper devised the scheme to defraud Pelletier as Pelletier describes that scheme. Third, as the district court noted, there is no evidence in the record from which a jury could infer that Zweifel intentionally participated in the scheme – if, in fact, such a scheme actually existed. Finally, even if Zweifel did participate as alleged, a jury could not find that Pelletier was injured by reason of an act committed in furtherance of that scheme.

ii.

The doctrine of res judicata bars Pelletier from now asserting a mail or wire fraud claim based upon the sale

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it was successful. Thus, in essence, Pelletier alleges that Zweifel conspired to sue himself. We cannot infer that Zweifel participated in the scheme on these facts.

Thus, the only claim that potentially caused Pelletier injury is the one grounded on Culpepper's misrepresentation of his intent to hand over managerial control of House of Travel to Pelletier, which allegedly induced Pelletier to purchase the Hurst Group's stock.

of the Hurst Group's stock. Res judicata actually encompasses two different preclusion doctrines: claim preclusion and issue preculsion. Claim preclusion bars the litigation of matters that could have been litigated in an earlier suit, but were not. Issue preclusion, on the other hand, bars the relitigation of matters that were actually litigated and decided in a prior suit. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984). The preclusive effect of a dismissal with prejudice, an unlitigated matter, thus is examined under the requirements for claim preclusion. Since such a judgment is unaccompanied by findings, it does not, however, collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327, 75 S.Ct. 865, 868, 99 L.Ed. 1122 (1955).

Claim preclusion bars a plaintiff from bringing a subsequent lawsuit when four requirements are met: "(1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases." *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). On January 16, 1985, Pelletier and Langston sued House of Travel, Culpepper, and the Hursts in state court seeking damages for breach of contract and fraud based on Culpepper's promise to transfer financial control of House of Travel to Pelletier ("the shareholders' derivative suit"), *see supra* slip op. p. 1613, p. ___. In that suit,

Pelletier alleged that Culpepper breached his oral promise to Pelletier, made prior to Pelletier's December 29, 1984 acquisition of the Hurst Group's stock, to transfer to Pelletier "complete financial control" of House of Travel and "supervisory responsibility" over its employees. In addition, Pelletier alleged that Culpepper never intended to perform the oral promise and thereby fraudulently induced Pelletier to purchase the Hurst Group's stock. Pelletier dismissed this suit with prejudice on May 4, 1985, as part of Elite's purchase of his House of Travel stock. After examining the allegations in the shareholders' derivative suit, we find that Pelletier now alleges essentially the same cause of action; further, since the resolution of the first suit satisfies the four requirements of res judicata, the present claim is barred.

The first two requirements, that there be (1) a final judgment on the merits (2) rendered by a court of competent jurisdiction, are satisfied easily. The law is clear that if a suit has been dismissed with prejudice pursuant to settlement, this is a final judgment that will ground a procedural bar. *Lawlor*, 349 U.S. at 327, 75 S.Ct. at 868; *United States v. Parker*, 120 U.S. 89, 95, 7 S.Ct. 454, 458, 30 L.Ed. 601 (1887); *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501-02 (11th Cir.1990). Equally settled is the proposition that federal courts will recognize the res judicata effects of a state-court judgment. The full faith and credit statute, 28 U.S.C. § 1738 (1988), provides that the judicial proceedings of any state shall have full faith and credit "in every court within the United States." This language requires all federal courts to give preclusive effect to state-court judgments "whenever the courts of the State from which the judgments emerged would do

so." *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415-16, 66 L.Ed.2d 308 (1980); *see also University of Tenn. v. Elliott*, 478 U.S. 788, 794, 106 S.Ct. 3220, 3224, 92 L.Ed.2d 635 (1986). In this case, the state court jurisdiction over the proceedings cannot be challenged, nor can the parties deny its preclusive effect in Georgia courts. Thus, the dismissal was rendered by a court of competent jurisdiction and is binding on this court if the parties are in privity and the cause of action is the same in both proceedings.

Although Zweifel was not a party in the shareholders' derivative suit, Zweifel and Culpepper's relationship, as described by Pelletier, is one of privity. Pelletier alleges that Zweifel conspired with Culpepper to defraud Pelletier. He does not allege, however, that Zweifel himself devised the scheme or that Zweifel himself made any misrepresentations prior to his December 29, 1984 purchase of the Hurst Group's stock.[75] Pelletier only alleges that Zweifel conspired with Culpepper to induce Culpepper to act. Zweifel's liability is grounded on Culpepper's execution of the conspiracy as Zweifel's agent: the liability is derivative.

In *Citibank, N.A.*, 904 F.2d at 1502-03, this court held that an order of dismissal with prejudice in favor of an

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[75] Zweifel's first contact with Pelletier was at the January 8, 1985 meeting in which Pelletier and Conner presented Culpepper with the draft management agreement. Any statements Zweifel made on January 8 could not have injured Pelletier by inducing him to invest in House of Travel since, according to Pelletier's own allegations, his purchase of the Hurst Group stock was complete on December 29, 1984.

agent bars a second suit against the principal on the same cause of action. In that case, Data Lease claimed that Citibank was vicariously liable for the misdeeds of seven of its agents. Prior to this lawsuit, Data Lease had settled with the agents and an order had been entered dismissing with prejudice the claims against them.

Courts, we held, must distinguish situations in which a person suffers injury as the result of the concurrent or consecutive acts of two or more persons from situations in which the defendant's responsibility is derivative or secondary. Where there are concurrent or consecutive acts, subsequent suits may be brought against the tortfeasor.

> Where, [however,] . . . the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff's right of action against the other.

Id. (quoting *Spector v. El Ranco, Inc.*, 263 F.2d 143, 145 (9th Cir.1959)). Applying this rule to our case, the agency relationship between Zweifel and Culpepper, *as alleged by Pelletier,* sufficiently establishes privity.

Finally, we hold that this suit involves the same cause of action as the shareholders' derivative action. For the purposes of claim preclusion, a court asks whether the plaintiff in the present suit is proceeding on the same cause of action as in the previous suit. " '[I]f a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, [then] the two cases are really the same "claim" or "cause

of action" for purposes of res judicata.' " *Id.* (quoting *Ruple v. City of Vermillion*, 714 F.2d 860, 861 (8th Cir.1983), *cert. denied*, 465 U.S. 1029, 104 S.Ct. 1290, 79 L.Ed.2d 692 (1984)); *see also Wallis v. Justice Oaks II, Ltd.*, 898 F.2d 1544, 1551 (11th Cir.) ("Claims are part of the same cause of action when they arise out of the same transaction or series of transactions."), *cert. denied*, ___ U.S. ___, 111 S.Ct. 387, ___ L.Ed.2d ___ (1990). Here the causes of action are sufficiently similar to bar Pelletier's new claims. In both suits, Pelletier alleged that Culpepper agreed to transfer some financial control to him in exchange for his purchase of the Hurst Group's shares and that Culpepper never intended to perform his promise. The nucleus of operative facts is the same; the substance of the actions is the same, *see I.A. Durbin*, 793 F.2d at 1549 ("The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." (citations and footnote omitted)). Accordingly, all four requirements of res judicata are met, and the predicate acts in Pelletier's RICO count based on his claim that Zweifel and Culpepper fraudulently induced him to purchase the Hurst Group's stock are foreclosed.

iii.

To succeed in proving that Zweifel committed the predicate acts of mail or wire fraud, Pelletier must show that Zweifel participated in a scheme to defraud Pelletier.

Since Pelletier does not claim, however, that Zweifel misrepresented anything to him, but rather that Zweifel conspired in a scheme that Culpepper implemented, Pelletier first must show that Culpepper committed mail and wire fraud and, second, that Zweifel conspired with Culpepper. He can show neither. To demonstrate that Culpepper violated the mail or wire fraud statutes, Pelletier must show that Culpepper had a conscious, knowing intent to defraud and that a reasonably prudent person would have been deceived by Culpepper's misrepresentations. Yet he only can show this if Culpepper *believed* that Pelletier would rely on his promises; otherwise, his claims of fraud will fail.

Pelletier asserts that, in December 1984, he and Culpepper reached an oral understanding on the division of managerial powers and that, relying on that understanding, he purchased the Hurst Group's stock. Even assuming this is true, Pelletier's secretly harbored intention to rely on the oral agreement is not evidence that Culpepper *knew* what Pelletier intended to do. While mail and wire fraud offenses are complete even before the targeted victim relies on the scheme and is defrauded by it, *Durland*, 161 U.S. at 313-15, 16 S.Ct. at 511-12, the mens rea element of the offense requires that the perpetrator of the scheme anticipate reliance. If Culpepper never believed that Pelletier would purchase stock on the basis of Culpepper's oral promise, Culpepper lacked the requisite criminal intent for the predicate acts of mail or wire fraud. After reviewing the evidence, we conclude that this is the case: Pelletier convinced Culpepper that only Culpepper's signature on a contract would trigger Pelletier's purchase of the Hurst Group's stock. Zweifel,

therefore, could not have participated in a scheme to defraud – there simply was no scheme.

On January 8, 1985, Pelletier presented a draft agreement – that his lawyer, Conner, had prepared – to Culpepper and Zweifel. The draft unequivocally stated that Pelletier had not yet finalized his purchase of the Hurst Group's stock and that "[p]rior to consummating [that] acquisition . . . , it [was] necessary for Pelletier to enter into [the management agreement] with Culpepper." This language clearly indicates that, throughout the course of their negotiations, the parties considered a written management agreement to be a condition precedent to the stock purchase. Even if Culpepper suggested to Pelletier that he would sign a management agreement when one was drafted, he still could not have expected Pelletier to act on that promise alone. At most, Culpepper would have expected Pelletier to expend time and money drafting a contract and negotiating the remainder of its terms. He could not expect Pelletier to buy the Hurst Group's stock. Culpepper simply acted on Pelletier's own representations: he had to sign the agreement before Pelletier would purchase the stock.

Culpepper's lack of criminal intent is further demonstrated by the nature of the agreement that Pelletier alleges he and Culpepper reached. Despite Pelletier's protestations to the contrary, he and Culpepper never concluded an enforceable oral management agreement. Under Georgia law, no contract exists unless the parties agree on all of its material terms and conditions and nothing is left to future agreement. *See, e.g., American Viking Contractors, Inc. v. Scribner Equip. Co.*, 745 F.2d

1365, 1369-70 (11th Cir.1984); *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1518 (11th Cir.1989). "[A] contract to enter into a contract in the future is a nullity." *American Viking*, 745 F.2d at 1370.

Pelletier claims that he and Culpepper reached an understanding that Pelletier would obtain working capital for House of Travel and that Culpepper would yield some of his authority to Pelletier. The agreement Pelletier presented to Culpepper on January 8 made, however, no mention of the type or amount of investment Pelletier would make in House of Travel; it merely provided that Pelletier would become a House of Travel shareholder by acquiring the Hurst Group's stock. While Culpepper testified that he wanted to eliminate the Hurst Group from House of Travel, Pelletier's and Culpepper's understanding contemplated, as Pelletier admitted, that Pelletier would provide working capital for House of Travel – not merely purchase a third party's interest in the company. Thus, even accepting Pelletier's allegations as to the terms of the agreement, the material provisions of that agreement were indeterminate. In such a case, a court cannot speculate what terms the parties would have agreed to if they had continued their negotiations; we, for example, do not know exactly how much working capital Culpepper would have asked Pelletier to provide for House of Travel before agreeing to yield his management powers.

Although we are not called upon now to enforce the alleged agreement, we feel that the status of the agreement along with the sophistication of the parties (as we note *supra*, Pelletier is a lawyer) indicates that Culpepper never intended to induce Pelletier to act. Pelletier and

Culpepper, as experienced businessmen, must have realized that any oral promises made during the course of the negotiations were unenforceable. Yet Pelletier asks us to infer, on his allegation alone, that Culpepper used such a promise to induce him to purchase the Hurst Group's stock. We cannot make this inference. The only competent evidence before us shows that Culpepper believed that negotiations would continue, and that if the final draft agreement prepared by Conner was suitable, he would sign it. If it was not suitable, then he and Pelletier would go back to the drawing board.

The court's task on a motion for summary judgment is to determine whether a genuine issue of material fact exists. Fed.R.Civ.P. 56(c). Whether Culpepper had devised a scheme to defraud Pelletier is certainly a material fact, but it is a fact that Pelletier would have the burden of proving at trial. When a nonmoving party has failed, after reasonable discovery to proffer any *competent* evidence to prove an essential element of his case, then no genuine issue exists, and the moving party is entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1196 (5th Cir.1986); 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2727, at 130 (2d ed. 1983). Pelletier has failed to produce any evidence that would suggest that Culpepper devised a scheme to induce Pelletier to buy the Hurst Group's stock; in fact, the evidence indicates that Culpepper believed that he acted in a way that should have prevented Pelletier from buying that stock. Because Pelletier has failed to produce evidence of a scheme to

defraud, Zweifel is entitled to summary judgment with regard to the allegations of mail and wire fraud.

iv.

Assuming that Culpepper had devised a scheme to induce Pelletier to buy the Hurst Group's stock, Pelletier can implicate Zweifel in the executed scheme by showing Zweifel's intentional participation in the scheme, i.e., that Zweifel "had a 'conscious knowing intent to defraud.' " *Kreimer*, 609 F.2d at 128 (quoting *United States v. Kyle*, 257 F.2d 559, 564 (2d Cir.1958), *cert. denied*, 358 U.S. 927, 79 S.Ct. 312, 3 L.Ed.2d 301 (1959)), or that he counseled Culpepper to make false representations with knowledge or reckless disregard of their falsity, *see United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir.1986), *cert. denied*, 479 U.S. 1069, 107 S.Ct. 961, 93 L.Ed.2d 1009 (1987). Pelletier does not offer any direct evidence of Zweifel's intent to participate in this scheme; rather, he asks us to hold that a jury could infer such an intent from circumstantial evidence. After reviewing the extensive record in this case, we hold that, even viewing the record in the light most favorable to Pelletier, he cannot show intentional participation.

We have great difficulty in squaring Zweifel's alleged conduct throughout the transaction and ensuing litigation with an intent to participate in the scheme as described by Pelletier. For example, the record discloses that Zweifel did not know prior to the January 8 meeting in Conner's office that Pelletier already had purchased the

Hurst Group's stock.[76] Thus, if Zweifel had been participating in any scheme to defraud Pelletier, he would not

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[76] There is some evidence to suggest that Pelletier told Culpepper and Zweifel on January 8 that he had acquired an interest in the Hurst Group's stock. Pelletier testified on deposition as follows:

> I made it clear that I had some sort of arrangement with the Hurst[]s. Just how clear, I don't remember. I believe at that time and prior to that time, and given the nature of the controversy between the Hurst[s] and the Culpepper[s] and a lot of allegations flowing from both parties, that I had perhaps made a business decision not to specifically get into detail the transaction with the Hurst[]s.
>
> . . . .
>
> [M]y introductory comments at the beginning of that meeting [made it] clear that I had become a stockholder in . . . House of Travel, and someone could be confused, I assume, whether I was a beneficial holder of stock or whether – the two of them would have enough knowledge to know I was not an owner of record since they controlled the records. I would say you could characterize a business decision that I had made not to give up all the cards. I think as a businessman, given the speculative nature of a lot of charges that were going back and forth, *that I didn't think that that was a good business decision to give up, you know, to hand everybody a copy of my agreement with the Hurst[s].*

(Emphasis added.) Conner also testified that the Hurst affidavit requesting House of Travel to issue a new certificate to Pelletier might have been shown to Culpepper and Zweifel. Conner, however, did not give the affidavit to Zweifel or Culpepper; rather, he kept it in his file.

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have known that he had already accomplished his goal; his conduct presumably still would indicate an intent to defraud Pelletier. Yet why would he tell Conner, *prior to the meeting*, that Culpepper "should not enter into [the Culpepper/Pelletier] Agreement because there is no consideration for it?" And why would Zweifel bring the January 8 meeting to a close if Pelletier and Conner had created the impression that Pelletier had not yet purchased the Hurst stock? Even before Pelletier (through

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Only the most vague statements were made regarding whatever agreement Pelletier had with the Hurst Group. No one ever attempted to contradict the language in the draft presented on January 8 to the effect that the signing of that agreement was a *condition precedent* to the consummation of a stock purchase agreement with the Hurst Group. Therefore, at most Pelletier and Conner told Zweifel and Culpepper on January 8 that Pelletier had entered into an agreement with the Hurst Group that was not yet finalized and that was subject to a condition precedent – the signing of the agreement with Culpepper.

What appears to be more likely is that Pelletier and Conner wanted to trick Culpepper into signing the agreement on January 8 by convincing him that his signature was necessary to rid himself of the Hurst Group and to acquire more operating capital for the company. Indeed, the Georgia Court of Appeals, in the state court action against Zweifel and Lokey & Bowden, *see supra* note 21, states that "[Pelletier] testified that [in making his presentation to Culpepper and Zweifel at Conner's law office on January 8, 1985,] he wished Culpepper to believe that he had not yet consummated the transaction with the Hurst Group but to believe that he was still negotiating with that group of shareholders as well as Culpepper." *Lokey & Bowden*, 385 S.E.2d at 91. To decide this appeal, however, we need not, and do not, decide the question concerning Pelletier's and Conner's intent on January 8.

Conner, on January 9, 1985) informed Zweifel of his investment in the company, Zweifel had decided that Culpepper should not sign the agreement. Such conduct is inherently inconsistent with an intent to induce Pelletier to invest in House of Travel.

Furthermore, Pelletier alleges that part of the overall scheme included attempts "to convince the investors to sell their shares to another investor at a relatively low price so that this new investor might bring new capital and sources of credit to the corporation." If so, why would Zweifel refuse to issue a stock certificate to Pelletier? Without that certificate, Pelletier could not sell his shares to a new investor. Pelletier, prior to the January 8 meeting, had guaranteed one of House of Travel's lines of credit, but obviously he was not about to guarantee any other obligations without the stock certificate. Therefore, Zweifel's refusal to issue a new certificate to Pelletier prevented him from selling to a new investor and discouraged him from obtaining any more working capital for the company. And why would Zweifel discourage any potential investors from purchasing Pelletier's share? If Pelletier was no longer House of Travel's "sugar daddy," then it seems that Zweifel should have been encouraging other investors to buy out Pelletier.

Zweifel's actions in the bankruptcy proceedings bolster his claim that he acted in good faith. If the purpose of the continuing scheme, in part, was "[t]o enable . . . Zweifel to obtain money and property for himself [and] for Lokey & Bowden," then Zweifel would not have counseled Culpepper to file a chapter 11 petition. Chapter 11 merely protected the company (and the shareholders' investment) from its creditors while the

company reorganized. But Zweifel and Lokey & Bowden were *creditors* of House of Travel. Zweifel might have hoped that his firm would be paid before the petition was filed, but he knew that no such payment had been made and nevertheless counseled Culpepper to file the petition. In essence, then, Zweifel counseled Culpepper to do something that would protect Pelletier's investment from Lokey & Bowden's claim.

We could go on but choose not to do so. Assuming that Culpepper had devised a scheme as described by Pelletier, the evidence clearly shows that Zweifel was doing everything possible to ensure its failure. As we note above, a scheme need not be successful to constitute a violation of the mail and wire fraud statutes. *See Durland*, 161 U.S. at 313-15, 16 S.Ct. at 511-12. However, we are equally aware that a scheme's success, or lack thereof, is relevant to the issue of intent to defraud. *See United States v. Pearlstein*, 576 F.2d 531, 542 (3d Cir.1978); *United States v. Meyer*, 359 F.2d 837, 839-40 (7th Cir.1966). Furthermore, this is not a case in which the defendant attempted to defraud someone but failed; rather, this is a case in which the defendant engaged in conduct that was inherently inconsistent with the goals of the alleged scheme.

Whether Zweifel intended to participate in the alleged scheme is certainly a material fact, but it is a fact that Pelletier would have the burden of proving at trial. *See Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554; *Fontenot*, 780 F.2d at 1196. Pelletier has failed to adduce any evidence to support his contention that Zweifel intended to participate in the scheme; indeed, Pelletier has alleged conduct on Zweifel's part that proves conclusively that Zweifel

did not intend to participate in the scheme described by Pelletier. "[I]t is quite clear what the truth is" in this case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944); we therefore agree with the district court that Zweifel did not commit the predicate acts of mail and wire fraud.

V.

Pelletier's RICO claim based on the mail and wire fraud predicate acts, however, suffers from a more fundamental and glaring defect. As we note above, section 1964(c) provides civil remedies to those persons who are injured "by reason of" racketeering activity. Pelletier's evidence, however, clearly demonstrates that, even if Zweifel did intentionally participate in a mail or wire fraud scheme, Pelletier was *not* injured by reason of that scheme.[77]

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[77] Probably the most obvious defect is Pelletier's allegation that he lost his investment in House of Travel by reason of Zweifel's conduct. We know now that this cannot be true. The Georgia Court of Appeals, as we note above, *see supra* slip op. pp. 1633-1634, pp. ___-___, has held that Pelletier never purchased House of Travel stock because the Hurst Group had already sold its stock to TI. Clearly, Pelletier lost his $150,000 investment in House of Travel because he bought something that did not exist. The Georgia court, however, did not hand down this decision until June 1989 – almost one year after the district court granted Zweifel's motion for summary judgment. Since we are concerned not only with the district court's order granting summary judgment, but also with Zweifel's motion for sanctions under Rule 11, we will assume for the sake of that discussion that Pelletier reasonably believed that he was buying House of Travel stock in December 1984. We will also

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Pelletier has alleged that he *was* the target of the Culpepper/Zweifel scheme and did rely to his detriment on various misrepresentations made in furtherance of that scheme. Therefore, Pelletier's *allegations*, if true, are sufficient to meet section 1964(c)'s requirement of injury, and normally we would accept those allegations as true. But, as we note above, when a plaintiff, on summary judgment, provides *only* bald allegations concerning an essential element of his case with no competent evidence to support those allegations, and when the plaintiff's evidence conclusively proves the opposite of his allegations, summary judgment in the defendant's favor is appropriate. *See Celotex*, 477 U.S. at 325, 106 S.Ct. at 2548; *Fontenot*, 780 F.2d at 1196. Indeed, Pelletier's evidence does prove the opposite of what he has alleged.

At the heart of Pelletier's case is his allegation that he relied on Culpepper's promise to transfer certain financial and managerial controls to Pelletier: according to Pelletier, he would not have purchased the Hurst Group's stock "without such promises and guarantees." Pelletier alleges that Zweifel counseled Culpepper to make such a promise. Furthermore, he alleges that he would not have purchased the stock had he known the extent of the Hurst Group's misappropriation of funds from the company – a

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assume that Pelletier reasonably believed, when he filed his complaint with the district court in January 1986, that he had purchased House of Travel stock. We do so simply to show that, even if Pelletier had actually purchased House of Travel stock, his complaint was frivolous when filed.

fact well known by Zweifel at the time Pelletier purchased the stock. On their face, these allegations seem reasonable and, if true, would likely satisfy section 1964(c)'s proximate cause requirement. Unfortunately for Pelletier, they are not true.

Consider the first allegation. According to Pelletier, Culpepper verbally promised, in mid-December of 1984, to give up certain powers as president of the company and transfer those powers to Pelletier for Pelletier's promise to obtain working capital for the company after he had purchased the Hurst Group's stock. For example, the agreement allegedly contemplated limiting Culpepper's authority to incur any liability to the amount of $2000 and that Pelletier would have sole authority to authorize expenditures in excess of $2000. Furthermore, Culpepper would give up most of his authority to hire personnel and transfer that authority to Pelletier and the board of directors. And, Culpepper purportedly agreed to transfer all authority over day-to-day operations to a vice president in charge of operations. Pelletier alleges that without these promises from Culpepper, he would not have purchased the Hurst stock.

We are troubled by this allegation. In deposition, Pelletier gave the following testimony, which we quote at some length.

> [During the December 29 meeting with the Hurst Group, when the stock purchase agreement was signed, the Hursts made] a lot of derogatory comments about Culpepper. . . . It was . . . enough to raise some concerns on my part as to whether Culpepper could be trusted. . . . [Conner] and I had an opportunity

> during the course of that day to have discussions. One of [the concerns] that [Conner] raised and had been raising before this meeting, probably raised even stronger, was that *I might be foolish in thinking that it was going to be so easy to get Culpepper to agree to what he already agreed to; in other words, to get it on paper.* That because of his fear, because of . . . Conner['s] fear that we might have difficulty in reducing Culpepper and my agreement to a writing because I think, as I think, I would have had a fear in doing that with the Hurst[]s, that certain things should take place. . . . [I]n the decision between [Conner] and I was that it was the security of knowing that if Culpepper didn't come in and reduce the agreement that he and I had to a writing, that I would be in a very bad position because I would be a 40 percent shareholder versus a 60 percent interest somewhere else, somewhere else being between Culpepper, Langston, and possibly the Hurst[]s. . . . [T]here was a concern that if Culpepper couldn't be trusted,that if he believed that he had . . . me over a barrel and knew that he could have been in a position of being still in control of [House of Travel] without dealing with me, that he could do so. Just a thought of maybe we can't trust him, either. Part of that distrust that I believe might be there was the fact that when I met with Culpepper on those two meetings, not only his distrust of the Hurst[]s was evident, but it was much more than that. There had been, from what I understood, some physical contact. People had been pushing each other around, gotten beyond just words. *And it was quite clear that foremost in Mr. Culpepper's mind was to get rid of the Hurst[]s.*

(Emphasis added.)

As an experienced attorney and businessman, Pelletier must have realized that his oral understanding with

Culpepper was unenforceable. Without further elaboration of Pelletier's obligation to obtain working capital for House of Travel, the negotiations bound neither Pelletier nor Culpepper. Pelletier's actions show that he recognized this. Pelletier testified that he and his attorney inserted certain safety provisions into the stock purchase agreement with the Hurst Group to guard against the possibility that Culpepper would not sign the draft management contract. The first was a litigation agreement. The Hurst Group had filed a state court suit, asking the court to direct Culpepper to tender 40 shares of the company's stock to the Hurst Group in satisfaction of Culpepper's alleged agreement to tender those 40 shares at the same time Leroy Langston tendered 40 of his shares to the Hurst Group. *See supra* slip op. at 1605-1606, at ___-___. The litigation agreement provided that the Hurst Group would use its best efforts in pursuing that state court claim and that Pelletier would have the right to choose counsel for the Hurst Group. If the Hurst Group prevailed, the agreement provided that the Hurst Group would convey the stock to Pelletier for the sum of $1000. Thus, if Culpepper refused to sign his agreement with Pelletier, Pelletier felt that he "would have some course of action [he] could take." If the Hurst Group prevailed in its suit, Pelletier would not need the management agreement with Culpepper: he would own 80% of the company's stock and would be in complete control.

As a further precaution, Pelletier and his attorney inserted a provision into the stock purchase agreement dealing with the tender of the Hursts' resignations as directors and officers of the company. Under this provision, the Hursts tendered their resignations to Pelletier

when they signed the stock purchase agreement. Pelletier, however, would not deliver the resignations to the corporation until he had reduced his agreement with Culpepper to writing and Culpepper signed it. Presumably, Pelletier intended this provision to keep the Hursts, who apparently were on Pelletier's "side," as directors of the company. Otherwise, if the Hursts resigned *and* Culpepper refused to sign the agreement, Culpepper would be the only director remaining, and Pelletier would have no receptive ear in the company's management. According to Pelletier, because he had "a concern that maybe [he] could not trust Culpepper and . . . was making a substantial financial investment[,] . . . certain protections were needed."

The point of this discussion should be clear by now. Pelletier went into this transaction with his eyes wide open: he took a chance that did not pay off. He testified that he "cut a lot of corners to do the deal. . . . [He] had a certain fear that th[e] opportunity was going to escape if [he] didn't move on it quickly." He had a real fear that Culpepper would not reduce his agreement to writing, so he structured the stock purchase agreement with the Hurst Group accordingly. Pelletier alleges that the "representations that Mr. Pelletier would be placed in financial control of . . . House of Travel . . . , and that certain management reforms and controls would be put in place were material to the transaction, in that Mr. Pelletier would not have made this investment without such promises and guarantees." This simply is not true. Pelletier structured the stock purchase agreement in a way that assumed that Culpepper might not come through.

Pelletier, by his own admission, did not rely on Culpepper's promises: although he thought that Culpepper would have good reason to sign the agreement, he acted as though Culpepper would not treat the prior verbal agreement as binding.

As one noted authority has said:

> Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction.

2 J. Pomeroy, A Treatise on Equity Jurisprudence § 890, at 1843 (4th ed. 1918); *see Farrar v. Churchill*, 135 U.S. 609, 616, 10 S.Ct. 771, 773, 34 L.Ed. 246 (1890). The foregoing discussion shows beyond a doubt that Pelletier did not trust Culpepper's representations and did not act as though he trusted Culpepper. He did not rely on the alleged misrepresentations and therefore cannot claim that his injury was proximately caused by Culpepper's fraudulent scheme.

As we note above, Pelletier also alleges that he would not have purchased the Hurst Group's stock if he had known the gravity and extent of the Group's misconduct. According to Pelletier, the members of the Hurst group misappropriated approximately $180,000 of the company's funds primarily by using the company's money to pay personal expenses. Pelletier alleges that Zweifel was aware of these misappropriations but failed to disclose that fact to Pelletier when he was considering purchasing

the Hurst Group's stock. *See United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir.1983) (nondisclosure of material fact with intent to create a false or fraudulent representation can constitute scheme to defraud under mail fraud statute).

In essence, Pelletier alleges that he was led to believe that House of Travel was worth one amount, that Zweifel was aware that the company was worth less than that amount (because the Hurst Group had misappropriated funds), and that, had Zweifel conveyed his information to Pelletier, Pelletier would not have purchased the stock. Pelletier's own testimony, however, conclusively contradicts this allegation. Pelletier testified that he estimated the value of the Hurst Group's shares by reviewing a financial statement Culpepper gave him at one of their mid-December (1984) meetings. The statement contained House of Travel's sales figures (and presumably expense figures as well). Pelletier testified as follows:

> I had asked him what his sales were. Other people have [a] different philosophy in the travel agency industry. My feeling is, I want to know what your sales are. *The rest we can handle. I don't care if you're losing money.* If you got the sales, your sales are at a certain point, looking at a number of broad factors, numbers of offices, that type of thing, it can be worked out, but sales are very important.
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> [L]et's go back to [the December 17 meeting with Culpepper]. He raised the indiscretions of the Hurst[]s, whatever they were. And, of course, I said to him that, you know, I understand that they, you know, they've raised whatever about you. . . . It didn't really matter to me

> that, basically, Culpepper and his lawyer had, whatever they had done to these guys to get them to sell for 150, my feeling was that if one set of the parties was removed, that the agency could get back on track, and that was a dynamite moneymaker. . . . There was no question that the Hurst[]s were off and running, doing whatever they wanted to do, and that the Culpepper[]s were off and running what they were doing, trying to do, and that the Hurst[ ]s had these sales people that were generating these sales, *but God knows what they were doing. . . . Even that was okay,* as long as everything could be defined and everything could be put in its proper structure.

(Emphasis added.)

Obviously, Pelletier based his estimate of the company's value *solely* on the amount of sales it had been generating. He did not care that the owners had been draining funds from the company through the company's expense accounts. But Pelletier has not alleged that Zweifel was aware of information that would call into question the accuracy of the *sales* figures. Instead, Zweifel allegedly was aware of information that would be reflected in the company's expense figures. Pelletier, by his own admission, relied only on the sales figures: he did not rely on any other information the accuracy of which would have been undermined had Zweifel disclosed the amount of the Hurst Group's misappropriations.[78] Obviously, Zweifel's alleged non-disclosure did not proximately cause Pelletier to invest in the company.

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[78] In fact, Pelletier's argument is logically flawed. Zweifel supposedly was aware of information that would have

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Assuming that Culpepper had devised a fraudulent scheme as described by Pelletier, and assuming Zweifel intentionally participated in that scheme, Pelletier has failed to produce any competent evidence from which we can infer that the alleged misrepresentations and omissions made in furtherance of the scheme proximately caused Pelletier any injury. In fact, Pelletier's own testimony shows conclusively that his injury, if any, was not

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revealed that the Company's expenses had been *overstated*. Without the Hurst Group funneling off money through the company's expense accounts, the company's *real* expenses would have been lower, making House of Travel *a better deal* than would have been indicated by a profit/loss or cash flow statement.

Finally, we note that throughout his deposition, Pelletier testified that he knew of the Hurst Group's misconduct. During one of his mid-December meetings with Culpepper, Culpepper told him that he and his lawyer were threatening to put the Hurst Group "in jail for these indiscretions." Pelletier cannot claim that he would not have purchased the Hurst Group's stock if he had known the extent of the indiscretions: he knew that they were serious enough to warrant criminal penalties. Pelletier's injury was not caused by Zweifel and Culpepper failing to tell Pelletier about the Hurst Group; rather his injury was proximately caused by his own decision to ignore the many warnings he had received about the Hurst Group's conduct. *See Shappirio v. Goldberg*, 192 U.S. 232, 241-42, 24 S.Ct. 259, 261, 48 L.Ed. 419 (1904) (party who has had an opportunity to investigate a representation and discover the truth, or who can be charged with knowledge of the truth, cannot claim that he relied on the representation); 2 J. Pomeroy, A Treatise on Equity Jurisprudence § 893, at 1851 (4th ed. 1918).

proximately caused by the misrepresentations and omissions. Whether Pelletier was injured "by reason of" the purported predicate acts of mail and wire fraud is certainly a material fact, but the record discloses no genuine issue that would warrant a trial. We conclude that summary judgment on this issue was appropriate.

c.

Pelletier also alleges, as a predicate act, that Zweifel, in connection with the Pelletier/Hurst Group transaction, committed securities fraud in violation of 15 U.S.C. § 78j(b) and Rule 10b-5. To succeed in showing that Zweifel violated these provisions, he must show that Zweifle misstated or failed to disclose a material fact, that Zweifel had an intent to deceive, and that Pelletier reasonably relied on and was injured by the misstatement or omission. *See Ross v. Bank South, N.A.*, 885 F.2d 723, 728 (11th Cir.1989) (en banc), *cert. denied*, – U.S. –, 110 S.Ct. 1924, 109 L. Ed. 287 (1990); *id.* at 738-39 (Tjoflat, J., specially concurring) (reliance must be reasonable). Pelletier relies on the same conduct to support his securities fraud allegation as he uses to support his mail and wire fraud allegations.[79] We will not belabor this issue. For the same reasons as stated in subsection (a) above, Pelletier is barred from asserting a claim based on fraud in his purchase of the Hurst Group's stock, and he has failed to

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[79] Pelletier also alleges that Zweifel failed to disclose to him that House of Travel's shares were restricted. Pelletier does not, however, advance any evidence that Zweifel intended to deceive Pelletier or that, even if he did, Pelletier relied on the omission.

produce any evidence to support an inference that Zweifel intended to deceive Pelletier or that Pelletier relied on the alleged misstatements or omissions.[80]

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[80] Pelletier's securities fraud allegation is defective for another reason. Pelletier's securities fraud allegations require that he show certain fraudulent conduct in connection with the purchase or sale of securities. In sum, since Pelletier never purchased a security from the Hurst Group, he has no claim under section 78j(b) or section 10b-5. The Georgia Court of Appeals has held that Pelletier purchased no securities from the Hurst Group on December 29, 1984. *See Lokey & Bowden v. Pelletier*, 192 Ga.App. 470, 385 S.E.2d 90 (1989). Pelletier concedes that the doctrine of collateral estoppel precludes him from contending in the instant case that he purchased the Hurst Group's stock on that date. He did not make this concession, however, until the oral argument of these appeals, when we asked Schlanger whether such a concession would be in order.

Putting this collateral estoppel issue aside, we do recognize that the standing requirements of the securities laws, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) (imposing purchaser-seller limitation on Rule 10b-5 private damages actions), do not apply to civil RICO actions based upon predicate acts of securities fraud – the plaintiff only must show that he was injured "by reason of" the violation, *see Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1466-67 (9th Cir.1990) (purchaser or seller standing limitation that applies to Rule 10b-5 actions does not apply to civil RICO claims based upon predicate acts of securities fraud) – the predicate acts must actually occur. Thus, *someone*, even if not the civil RICO plaintiff, must have been a purchaser or seller of securities. Pelletier does not claim, however, that any other person purchased or sold securities in connection with Culpepper's representation to him. He claims only that he was personally defrauded; and for this claim to succeed, he actually must have purchased the Hurst Group's stock.

B.

Pelletier contends that the district court erred in summarily disposing of his securities fraud claims, counts two and five of his amended complaint. Count two is based on 15 U.S.C. § 78j(b) and Rule 10b-5, and count five is based on Ga.Code Ann. § 10-5-12(a)(2) – Georgia's equivalent of Rule 10b-5. A plaintiff must prove essentially the same elements under the state provision as he must prove under the federal provisions. *Cf. Kirk v. First Nat'l Bank*, 439 F. Supp. 1141, 1147-48 (MD.Ga.1977); *Curtis v. State*, 99 Ga.App. 732, 109 S.E.2d 868, 871-72 (1959). As we discuss above in connection with Pelletier's allegation of securities fraud as a RICO predicate act, *see supra*, Pelletier is barred from asserting a claim based upon his purported purchase of the Hurst Group's stock and he has failed to produce any evidence from which we could infer that Zweifel intended to deceive Pelletier or that Pelletier relied on Zweifel's purported misrepresentations or omissions. Furthermore, the Georgia Court of Appeals' holding that Pelletier never purchased any House of Travel stock, which Pelletier concedes has estoppel effect, *see supra* note 80, disposes of these claims as well. Summary judgment in favor of Zweifel on the securities fraud claims is therefore appropriate.

C.

To summarize, the district court's order granting summary judgment in favor of Zweifel on the count one RICO claims should be affirmed: Pelletier has failed to produce any evidence that Culpepper or Zweifel had

devised a scheme to defraud Pelletier, that Zweifel knowingly participated in a mail, wire, or securities fraud scheme or that Pelletier was injured by reason of any of the alleged predicate acts. For the same reasons, we affirm the district court's grant of summary judgment on the remaining federal and state securities fraud claims.

III.

Pelletier also challenges the district court's order dismissing, under Fed.R.Civ.P. 12(b)(6), his claims that Zweifel made false statements in violation of Ga.Code Ann. § 16-10-20 (count seven), committed state law barratry (count six), and violated the state RICO provision (count eight).[81] We conclude that the district court properly dismissed each of these claims.

A.

Section 16-10-20 of the Georgia Code prohibits the making of false statements in any matter "within the jurisdiction of any department or agency of state government or the government of any . . . political subdivision of [the] state." Ga.Code Ann. § 16-10-20 (1988). To prevail on this count, Pelletier must show that (1) Zweifel violated the false statements statute; (2) the statute creates a civil cause of action; and (3) the violation of the statute

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[81] Pelletier, in his brief on appeal, does not challenge the dismissal of his federal securities fraud claims in counts three and four of his amended complaint.

injured him. Pelletier's allegations are not sufficient to satisfy these requirements.[82]

For Pelletier, the most difficult aspect of showing a violation of section 16-10-20 is not proving that Culpepper or Zweifel made misrepresentations – we assume for Rule 12(b)(6) purposes that these allegations are true – but rather that the misrepresentations occurred within the jurisdiction of a government agency. We have sifted through Pelletier's lengthy amended complaint, but only uncover allegations that Culpepper, counseled by Zweifel, misrepresented facts to state and federal court officials and to Pelletier. None of the alleged statements implicated the jurisdiction of a department or agency of the state. Consequently, Pelletier cannot claim that Zweifel's or Culpepper's misrepresentations violated the false statement statute.[83]

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[82] Count seven of Pelletier's complaint states:

> The actions of Mr. Zweifel and those acting in concert with him described in this complaint constitute a violation of the provisions of [the Georgia false statements statute, Ga. Code Ann.] § 16-10-20.

[83] Even if Pelletier could meet the jurisdictional requirements of this statute, we share the district court's conclusion that it does not create a civil cause of action. Section 51-1-6 of the Georgia Code provides a cause of action for violations of statutes that are intended to benefit the party bringing the suit. The false statement statute was enacted, however, for the protection of the state itself – not private parties. Moreover, as noted *infra*, no private cause of action lies for false statements made in judicial proceedings. *Peters v. Imperial Cabinet Co.*, 189 Ga.App. 337, 375 S.E.2d 635, 636 (1988).

While we could end our discussion here, we give Pelletier every possible benefit of the doubt and show that, even with a liberal reading of his complaint and a favorable construction of the law, he cannot state a claim. If we assume, for example, that Pelletier intended to invoke the broader jurisdictional reach of section 16-10-71 of the Georgia Code, the false swearing statute, Pelletier's claim still must fail. Pelletier cites a Georgia Court of Appeals decision, *Peters v. Imperial Cabinet Co.*, 189 Ga.App. 337, 375 S.E.2d 635, 636 (1988), which recognizes a private cause of action under the false swearing statute in conjunction with a provision of the Georgia tort code that creates a cause of action "[w]hen the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another," Ga.Code Ann. § 51-1-6 (1982).

Pelletier's complaints (the original and the amended complaint) mention two possible types of misrepresentations: those that were made in a judicial proceeding and those that were made outside a judicial proceeding. Action on either type of misrepresentation is precluded. *Peters* itself expressly forestalls an action for false swearing that occurs during a judicial proceeding. *Peters*, 375 S.E.2d at 636; *see also Commercial Plastics & Supply Corp. v. Molen*, 182 Ga.App. 202, 355 S.E.2d 86 (1987); *Sun v. Bush*, 179 Ga.App. 140, 345 S.E.2d 873, 874 (1986). And the only possible evidence of false swearing outside a judicial proceeding that we can discern is the affidavit of September 18, 1984, in which Culpepper stated that he had secretly arranged with the Hurst Group not to transfer his House of Travel shares to it, thereby inducing

Langston to sell.[84] While a civil cause of action might lie for this misrepresentation. Pelletier does not claim that Zweifel knew that Culpepper's representation was false or that he suffered any injury as a result of it – nor, in our opinion, could he.

B.

Pelletier also alleges that Culpepper and Zweifel, acting in concert, violated the Georgia barratry statute, Ga.Code Ann. § 16-10-95. This court is left again to its own devices to substantiate Pelletier's allegations.[85] We assume that Pelletier refers to Culpepper's chapter 11 petition on behalf of House of Travel which was filed after Zweifel had been discharged as House of Travel's counsel and Culpepper had been discharged as its president.

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[84] When Culpepper ostensibly sold 80% of his House of Travel stock to the Hurst Group on October 14, 1983, House of Travel's secretary voided Culpepper's stock certificate and prepared two new stock certificates: one in the name of William Charles Hurst for 40 shares and one in the name of Culpepper for 10 shares. To induce the secretary to void the new certificates and prepare a new certificate for Culpepper, evidencing his ownership of 50 shares, Culpepper signed an affidavit in which he acknowledged the existence of this secret agreement.

[85] Pelletier simply pleads:

> The actions of Mr. Zweifel and those acting in concert with him described in this complaint constitute a violation of the provisions of [the Georgia barratry statute, Ga.Code Ann. § 16-10-95].

A person commits barratry when he knowingly and willfully:

> (1) Excites and stirs up groundless actions in the courts or quarrels in administrative proceedings;
>
> (2) Institutes or causes to be instituted a legal proceeding without obtaining proper authorization; or
>
> (3) Solicits or encourages the institution of a judicial or administrative proceeding or offers assistance therein before being consulted by a complainant in relation thereto.

Ga.Code Ann. § 16-10-95. The district court held that this section does not create a civil cause of action. Even assuming, however, that Pelletier could invoke section 51-1-6 of the Georgia Code and that this section, by implication, provides a civil action for barratry, a question we decline to decide, and, further, that Zweifel counseled the filing of the petition, Pelletier alleges no injury resulting from the bankruptcy proceedings. As we discuss above, the Hurst Group ratified that filing, and Pelletier expressly consented to the subsequent prosecution of the chapter 11 petition. In addition, Pelletier presents no evidence that the protection offered to an insolvent company under chapter 11 actually harmed Pelletier as a stockholder.

C.

The district court dismissed Pelletier's state RICO claim because his complaint did not allege how the Georgia statute was violated. To state a civil RICO claim a plaintiff must plead that (1) the defendant violated the act

and (2) the plaintiff was injured as a result of the violation. Pelletier does not allege, however, that Zweifel committed any of the predicate acts for Georgia RICO.[86] Consequently, his claim must fail. Even if we assume, however, that Pelletier intended to allege the false statements and barratry violations as predicate acts, Pelletier's state RICO claim also must fail since we conclude that neither of those substantive violations is meritorious.

IV.

A.

We now consider the district court's denial of Zweifel's motion for sanctions pursuant to Rule 11. Rule 11 provides, in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is *well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, *and that it is not interposed for any improper purpose, such as to harass* or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall impose*

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[86] In count eight, Pelletier pleads:

> The actions of Mr. Zweifel and those acting in concert with him described in this complaint constitute a violation of the provisions of the Georgia RICO Act, [Ga.Code Ann. § 16-14-1 *et seq.* (1988)].

> upon the person who signed it, a represented party, *or both*, an appropriate sanction. . . .

(Emphasis added.) In denying Zweifel's motion for sanctions, the district court focused on the factual basis of Pelletier's allegation that Zweifel intended to participate in Culpepper's scheme. The court noted that Zweifel, in his motion, did not "specifically point out any allegations in the complaint which are misleading by reason of omission of facts which should have been available to Plaintiff's counsel through reasonable inquiry." Although the court held that Zweifel did not have the requisite intent to participate in the scheme, it could not fault Pelletier "for the fact that Congress enacted legislation which allows [a RICO] claim to be made against an individual who by no stretch of the imagination would be thought of as a racketeer by any intelligent member of the public."

The Supreme Court has recently held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, ___, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). Therefore, we may reverse the district court's denial of sanctions only if we find that it abused its discretion. We find such an abuse of discretion in this case.

The Court, in *Cooter & Gell*, held that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* The district court below, apparently of the view that its examination of Pelletier's complaint was circumscribed by the allegations in Zweifel's motion for sanctions, limited its inquiry to the merits of Pelletier's allegation that Zweifel

intended to participate in Culpepper's scheme. A district court, however, must impose sanctions sua sponte whenever it finds a complaint to be frivolous. The court below operated under an erroneous view of the law: it should have conducted – on its own initiative – a much more searching inquiry into the merits of Pelletier's complaint. Because it failed to conduct such an inquiry, it developed a clearly erroneous assessment of the evidence.

We next turn to the standard imposed by Rule 11 and show that, as a matter of law, Pelletier and his attorney should be sanctioned for filing and pursuing this action.[87]

B.

This court has held that three types of conduct warrant the imposition of Rule 11 sanctions: (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) when the party files a pleading in bad faith for an improper purpose. *See United States v. Milam*, 855 F.2d 739, 742 (11th Cir. 1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc).[88]

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[87] We need not remand the Rule 11 issues to the district court for further consideration under a proper application of the law. The record before us demonstrates beyond any question that Rule 11 sanctions are in order, what the sanctions should be at a minimum, and that Pelletier and Schlanger should be liable for them jointly and severally.

[88] Rule 11 imposes a standard of reasonableness under the circumstances. *See* Fed.R.Civ.P. 11 advisory committee note. A

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We conclude that Pelletier's complaint had no reasonable factual basis when pled and that Pelletier and

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court should apply this standard with two goals in mind: to deter the filing of frivolous claims and defenses, *see Thomas v. Evans*, 880 F.2d 1235, 1239 (11th Cir. 1989), *cert, denied*, ___ U.S. ___, 111 S.Ct. 261, 112 L.Ed.2d 218 (1990); Schwarzer, Rule 11 Revisted, 101 Harv.L.Rev. 1013, 1020 (1988); Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901, 907 (1988), but not to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," Fed.R.Civ.P. 11 advisory committee note.

In assessing Rule 11 sanctions, a court first determines whether the party's claims are objectively frivolous – in view of the facts or law – and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous, i.e., whether he would have been aware had be made a reasonable inquiry. If the attorney/party did not make a "reasonable inquiry," then the court must impose sanctions – despite a good faith belief that the claims were sound. *See Donaldson*, 819 F.2d at 1556. With regard to the reasonableness of the party's inquiry into the pleading's factual basis, a court may consider whether the signing attorney accepted the case by referral from another member of the bar; the time available for investigation; the extent of the attorney's reliance on his client's version of the facts; the complexity of the facts; and the extent to which factual development requires discovery. *See* Fed.R.Civ.P. 11 advisory committee's note; *Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 875 (5th Cir. 1988) (en banc); ABA, Section of Litig., Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 114 (1988) [hereinafter ABA Standards]. With regard to the reasonableness of a pleading's legal basis, a court may consider the time available to prepare the pleading; the complexity of the legal issues; the plausibility of the argument; and whether the party is proceeding pro se. *See* Fed.R.Civ.P. 11

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Schlanger knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith; they simply demanded from Zweifel the redress they had sought and failed to obtain from Culpepper on similar meritless claims.

We first recapitulate the evidence indicating that Pelletier's complaint had no adequate factual basis and was filed in bad faith. Where as here, we have no direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim. *See Evans*, 880 F.2d at 1243; *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986). On the record available to us, we find strong circumstantial evidence that Pelletier and Schlanger brought this RICO suit for an improper purpose.

1.

As we have observed, Pelletier's purchase of the Hurst Group's stock is at the heart of this lawsuit: Culpepper, after consulting Zweifel, allegedly induced Pelletier to purchase the Hurst Group's stock by falsely

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advisory committee note; *Capital Security*, 836 F.2d at 875-76; ABA Standards, 121 F.R.D. at 116-17.

Since, however, we find that Pelletier and Schlanger actually knew from the beginning that Pelletier's claims were frivolous but proceeded to prosecute them anyway, it is unnecessary for us to examine what a reasonable inquiry by Schlanger would have revealed.

promising to transfer financial and managerial control of House of Travel to him. As we have observed, that promise, if it was made, was unenforceable; Culpepper had no legal obligation to turn over control of House of Travel to Pelletier. Pelletier, who is a lawyer (he had been a member of the Georgia bar for nearly ten years at the time he brought this suit and had established a Georgia bar review course), knew this – that he could not rely upon Culpepper's promise. Pelletier nonetheless took a calculated risk and decided to purchase the Hurst Group's shares; he did so on December 29, 1984 – ten days before he presented Culpepper with the draft management agreement he hoped Culpepper would sign.

Pelletier's claim that he relied on Culpepper's promise to turn over control – that he would not have purchased the Hurst Group's stock but for the promise – borders on the preposterous. The plain fact is that he expected Culpepper to renege, and he therefore took several steps to protect himself. First, he kept his purchase secret from Culpepper; this enabled him to tell Culpepper, on January 8, 1985, when they met in Conner's law office to go over the agreement Conner had prepared, that he would not purchase the Hurst Group's stock and obtain the working capital House of Travel needed unless Culpepper kept his promise. In other words, by keeping the Hurst Group transaction secret, he might be able to induce Culpepper to act – instead of the other way around. Second, Pelletier, anticipating that Culpepper would not capitulate, made a side agreement with the Hurst Group; the Hursts would remain on House of Travel's board of directors – as Pelletier's nominees – and would give Pelletier the right to prosecute

their state court suit for specific performance against Culpepper. Thus, if Culpepper refused to give in, Pelletier could obtain control over House of Travel's operations if the Hurst Group won the case, i.e., he would acquire (from the Hurst Group) 40 more House of Travel shares, given him 80% of the company's stock.

When Culpepper subsequently refused to sign the contract Conner had prepared, Pelletier took a new tack in his effort to obtain control of House of Travel's affairs. He would not wait for the Hurst Group's suit for specific performance to run its course; rather, as he wrote to his attorney, Frank Bassett, on January 9, 1985, he would have House of Travel's "lenders place [it] in default" and then have the state court either appoint a receiver to manage the company's affairs or a provisional director who, collaborating with his two nominees, the Hursts, would effectively give him control of the company's board. This pressure, Pelletier thought, would be more than Culpepper could bear; Culpepper would have to give in.

As it turned out, none of Pelletier's strategies bore fruit, and he eventually sold out to Elite, receiving for his shares $50,000 (half in cash and half in the form of a promissory note from Elite, Carson, and Culpepper) and the right to sue Zweifel and Lokey & Bowden, if given leave to do so by the bankruptcy court, on any claims House of Travel might have had against them. To obtain this price for his stock, however, Pelletier had to dismiss, with prejudice, his suits against Culpepper: his (and

Langston's) shareholders' derivative suit, and the Hurst Group's suit for specific performance.[89]

The bankruptcy court refused to grant Pelletier permission to sue Zweifel and his law firm; the House of Travel claims Pelletier wanted to bring against them were meritless and, moreover, House of Travel – and thus its general creditors – might suffer heavy sanctions under Rule 11 if Pelletier brought suit. Pelletier, however, was not to be deterred. On January 23, 1986, he sued Zweifel and Lokey & Bowden in state court, claiming that, as House of Travel's counsel, they had breached the fiduciary duties they owed him, as one of the company's shareholders, by preferring Culpepper over him. His claims had no merit, and once the Hurst Group/TI transaction came to light – establishing that Pelletier had never been a House of Travel shareholder and thus could not have been owed any fiduciary duties by the company's attorneys, his claims were summarily rejected. On January 30, 1986, Pelletier brought the suit now before us.

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[89] Pelletier had a third suit against Culpepper, the federal securities fraud suit he had Schlanger bring (in the name of the Hurst Group) as a strategic ploy on January 16, 1985, the same day Bassett filed Pelletier's (and Langston's) shareholders' derivative action. *See supra* slip op. pp. 1614-1615, pp. ___ - ___. The district court dismissed this suit without prejudice on September 26, 1985; thus, Pelletier could have refiled it. Culpepper evidently overlooked this fact when, in exchange for his signature on the $25,000 note to Pelletier, he did not require Pelletier to give him a release of the Hurst Group's securities fraud claims in addition to the dismissal of the two suits mentioned in the text.

As we have stated, at the heart of Pelletier's complaint is the notion that Culpepper fraudulently induced Pelletier to purchase the Hurst Group's stock by falsely promising to give Pelletier control of House of Travel's affairs. Pelletier can no longer seek recompense from Culpepper, having dismissed his suits against him with prejudice. Instead, he seeks to hold Zweifel liable because he supposedly counseled Culpepper to make the false promise and, then, to renege on it.

When he filed his complaint and, later his amended complaint, in this case, Pelletier knew that Culpepper had not defrauded him; Culpepper simply refused to sign a contract that Pelletier wanted him to sign. Pelletier also knew that Zweifel had done nothing more than to advise his client not to sign – because the agreement Conner had drafted was one-sided; it provided for no consideration from Pelletier to Culpepper. All that Pelletier had going for him, therefore, was what had been apparent all along – that Zweifel had advised Culpepper not to sign the agreement Pelletier's lawyer had drafted. This fact, quite obviously, was not enough to make out a conspiracy between Culpepper and Zweifel to trick Pelletier into buying the Hurst Group's stock. And unless he could establish such a conspiracy, Pelletier had no hope of proving the RICO claim (count one)[90] and the federal and

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[90] As noted, the only possible support for the RICO claim was Zweifel's allegedly fraudulent conduct in the Pelletier/Hurst Group transaction and in the filing of House of Travel's Chapter 11 petition. If there was no fraud in the first transaction, then Pelletier had to rely on the bankruptcy fraud to prove his RICO claim. A single predicate act of bankruptcy

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state law securities fraud claims (counts two through six of his original complaint; counts two through five of his amended complaint) that he had brought against Zweifel. Pelletier also knew that he could not make out a case on any of the other claims he had asserted (counts seven through ten of his original complaint; counts six through eight of the amended complaint).[91]

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fraud, however, as Pelletier well knew, would not be enough to make out a RICO violation; the act of bankruptcy fraud, if it indeed occurred, was an isolated transaction unrelated to any of the other predicate acts alleged in count one. As an isolated, unrelated predicate act, it could not establish the pattern of racketeering activity necessary to prove a RICO claim. *See supra* slip op. pp. 1634-1635, pp. ___ - ___.

[91] As discussed in detail *supra*, each count in Pelletier's original complaint was objectively frivolous when filed. We briefly reiterate the reasons here:

Counts one and ten. Federal and state RICO claims under 18 U.S.C. § 1961 *et seq.;* Ga.Code Ann. § 16-14-1. Suffice it to say that the evidence unequivocally shows that Culpepper and Zweifel never devised a scheme to defraud Pelletier and that, even if it were assumed that Culpepper devised such a scheme, Zweifel did not intend to participate in it. Furthermore, the evidence shows that Pelletier, by his own admission, was not injured by the alleged scheme. At the time Pelletier filed his complaint, the law clearly required that a civil RICO plaintiff show that one or more predicate acts, committed as part of a pattern of racketeering activity, caused him some injury.

In addition to the predicate acts set out in the text *supra*, Pelletier alleges that Zweifel held himself out as House of Travel's attorney, when, in fact, he was representing Culpepper personally; that he engaged in discovery abuse while representing House of Travel in the state court litigation; and that on

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It is apparent to us that Pelletier brought this suit purely to harass Zweifel and, in the process, to extract a

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one occasion he spoke abusively to Emily Langston. Certainly, if these allegations are true, Zweifel may have acted unmannerly or committed a breach of professional ethics. Such conduct, however, does not in and of itself give rise to civil RICO liability. These allegations are simply irrelevant.

Count two. A federal securities fraud claim based on 15 U.S.C. § 78j(b) and Rule 10b-5. A person violates these provisions only if he has an intent to defraud, deceive, or manipulate. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1381, 47 L.Ed.2d 668 (1976). As we indicate above, Pelletier's evidence – evidence available to Pelletier and Schlanger at the time they filed the original complaint – clearly shows that Zweifel had no such intent. Moreover, a plaintiff under this section must show that he relied on the misrepresentation or omission and that his injury was proximately caused by the fraud. *Bruschi v. Brown*, 876 F.2d 1526, 1530 (11th Cir. 1989). As we discuss at length above, Pelletier has shown that his loss, in fact, was not caused by the alleged misrepresentations or omissions. Finally, Pelletier and Schlanger realized that all of the securities fraud claims (counts two, three, and four) became frivolous when the Georgia Court of Appeals ruled, in June 1989, that no purchase or sale of securities had ever taken place between Pelletier and the Hurst Group. When Schlanger filed his brief on appeal to this court two months later, however, he continued to prosecute all of the securities fraud claims. He did not, as required by the ABA Model Rules of Professional Conduct, put the court on notice that his client was never a House of Travel shareholder. *See* Rule 3.3 (1989).

We conclude that Pelletier's count two claim had no reasonable basis in fact at the time the original complaint was filed.

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settlement from him. Our conclusion is buttressed by the manner in which Pelletier pled his case in the district

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Count three. A federal securities fraud claim based on 15 U.S.C. §§ 77*l*(1), (2). This provision applies only to persons who offer or sell securities. When Pelletier filed his original complaint, this circuit defined a person who offered or sold a security as one who directly or proximately caused the purchaser to buy the securities. *See Foster v. Jesup & Lamont Sec. Co.*, 759 F.2d 838, 843-44 (11th Cir. 1985). As we note in our discussion above, nothing Zweifel or Culpepper did proximately or directly caused Pelletier to purchase the Hurst Group stock. As is evident from our discussion, all of the facts necessary to show the absence of proximate causation were available to Pelletier and Schlanger before they brought this suit. This claim, at the time it was made, had no reasonable basis in either fact or law.

Count four. A federal securities fraud claim under 15 U.S.C. § 77q(a). This provision prohibits essentially the same conduct as that prohibited by section 78j(b). Therefore, for the reasons stated with respect to count two above, this claim had no reasonable basis in fact when it was made.

Count five. A state securities fraud claim under Ga.Code Ann. § 10-5-12(a)(2) (1989). This provision prohibits the same conduct as that prohibited by section 78j(b). Again, for the reasons stated in our discussion of count two, this claim had no reasonable basis in fact when it was made.

Count six. A state law barratry claim under Ga.Code Ann § 16-10-95 (1988). Even if this section creates a private cause of action, Pelletier could not prove any injury from the violation, as we note in the text *supra*.

Count seven. A claim for making false statements in violation of Ga.Code Ann. § 16-10-20 (1988). This provision clearly provides no private right of action for false statements made in

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court and briefed it on appeal. Pelletier's complaints, which Schlanger drafted, are rambling recitations (141 numbered paragraphs in the original complaint; 261 in the amended complaint) of House of Travel's history – from the time of its incorporation until his chapter 11 disposition. They are quintessential "shotgun" pleadings, replete with factual allegations that could not possibly be material to any of the causes of action they assert. Each count incorporates all of these factual allegations and states, further, that it is based on the conduct in the complaint attributable to Zweifel and "those acting in concert with him." Anyone schooled in the law who read these complaints, however, would know that many of the facts alleged could not possibly be material to all of the counts. Consequently, Zweifel and the district court had to sift through the facts presented and decide for themselves which were material to the particular cause of action asserted, a difficult and laborious task indeed.

As we have recounted, Judge Tidwell heard the motion Zweifel addressed to Pelletier's original complaint. At the hearing, he told Schlanger that he was "treading on mighty dangerous grounds" and should acquaint himself with Rule 11. Judge Tidwell, however, did not rule on Zweifel's motion, having decided to recuse himself from the case. Then, before Judge Evans,

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judicial proceedings, *see Peters v. Imperial Cabinet Co.*, 375 S.Ed.2d 635, 636 (Ga.Ct.App. 1988), and any false statements made outside of judicial proceedings did not harm Pelletier. Therefore, this claim had no reasonable basis in either fact or law when it was made.

who took over the case, could rule on the motion, Schlanger filed an amended complaint.

In the amended complaint, Schlanger followed the format he used in drafting the original complaint; that is he began with a rambling recitation of House of Travel's history and then stated Pelletier's claims for relief – basing them, as before, on all of the facts pled. This time he embellished his factual allegations by incorporating by reference four volumes of evidentiary exhibits (in total, five and one half inches thick).

The task of deciphering Pelletier's amended complaint far exceeded the task of deciphering his original complaint. In his count one RICO claim, Pelletier, as we have previously observed, attempted to assert not one claim but four claims.[92] That is, he sought treble damages under 18 U.S.C. § 1964(c) for Zweifel's alleged violation of all four of RICO's criminal provisions: 18 U.S.C. §§ 1962(a), (b), (c), and (d). *See supra* note 63.[93] Thus, by alleging in count one that Zweifel had violated each of section 1962's subsections, Pelletier was claiming that Zweifel had injured him (1) by investing income derived from a pattern of racketeering activity in the operation of two enterprises engaged in interstate commerce, House of Travel and Lokey & Bowden[94] (section 1962(a)); (2) by

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[92] Nowhere in his briefs to us, however, does Pelletier acknowledge that count one asserts *four* RICO violations, of 18 U.S.C. §§ 1962(a), (b), (c), and (d), not *one*.

[93] Pelletier attempted to do the same thing in his original complaint.

[94] In his original complaint, Pelletier alleged that Zweifel invested such income in a third enterprise as well, the

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acquiring or maintaining, through a pattern of racketeering activity, an interest in or control over such enterprises (section 1962(b)); (3) by conducting or participating in the conduct of (as an employee or associate) the affairs of such enterprises through a pattern of racketeering activity (section 1962(c)); and (4) by conspiring to accomplish each of these objectives (section 1962(d)). The amended complaint, however, as in the case of the original complaint, does not explain how Zweifel purportedly did these things. For example, in claiming that Zweifel violated section 1962(a), the amended complaint does not identify any income that Zweifel obtained from a pattern of racketeering activity; nor, assuming that he obtained such income, it does not explain how, if at all, he invested it in the two enterprises. In claiming that Zweifel violated section 1962(b), the amended complaint does not indicate how Zweifel acquired or maintained, through a pattern of racketeering activity, an interest in or control over House of Travel; nor does it describe such interest. The amended complaint does say that Zweifel had a partnership interest in the Lokey & Bowden enterprise, but it does not allege any facts from which one could infer that he acquired or maintained his partnership interest in that enterprise through a pattern of racketeering activity.[95] In claiming that Zweifel violated section 1962(c), the amended complaint does not indicate how, if at all,

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Bankruptcy Court for the Northern District of Georgia. He deleted this allegation when he filed his amended complaint.

[95] Zweifel charged House of Travel fees for legal services performed, but there is no allegation that such fees enabled him to maintain his partnership interest in the firm.

Zweifel, as an employee or associate of House of Travel and Lokey & Bowden, conducted, or participated in the conduct of, the affairs of those enterprises through a pattern of racketeering activity. To be sure, the amended complaint alleges that Zweifel engaged in such conduct, but the allegation is nothing more than a bald conclusion. To discern whether, in fact, Zweifel engaged in the proscribed conduct, one has to look to the exhibits attached to the amended complaint and then attempt to make the factual allegations Pelletier failed to make. These exhibits, considered in the light of Pelletier's conclusion that Zweifel violated section 1962(c), suggest, perhaps, that Zweifel, as House of Travel's lawyer and as a Lokey & Bowden partner, furthered the business purposes of these two enterprises by conspiring with Culpepper to find working capital for House of Travel, and thus fees for Lokey & Bowden; such a conspiracy purportedly constituted an act of racketeering and, assuming that the act was part of a pattern of racketeering activity,[96] the conduct of the enterprises' affairs through a pattern of racketeering. Finally, in claiming that Zweifel violated section 1962(d), the amended complaint does not indicate how an unexecuted conspiracy to violate sections 1962(a), (b), and (c), which is all that subsection 1962(d) requires to make out an offense, could have "injured [Pelletier] in his business or property." *See* 18 U.S.C. § 1964(c).

The remaining counts are no easier to decipher, as our discussion rejecting Pelletier's multiple RICO claims

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[96] This is an assumption that we cannot draw from the amended complaint and the incorporated exhibits, but do for sake of discussion.

discloses.[97] As we did in assessing the merits of the RICO claims, we undertook the task of reading these counts in the light of the four volumes of evidentiary exhibits incorporated into the amended complaint by reference to discern whether any of them stated a claim for relief. We found that none had merit.

Pelletier's briefs to us on appeal[98] are also unilluminating; they do nothing more than contend, in a

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[97] Even in his brief before this court Schlanger does little to clarify which facts support which claims. *See also infra*. For example, he gives the following explanation of the Georgia RICO claim:

> The district court also dismissed Mr. Pelletier's Georgia RICO act claim, O.C.G.A. § 16-14-1, because
>
> > Count Eight alleges a violation of the Georgia RICO Act, O.C.G.A. § 16-14-1, et seq., but does not allege how the Georgia RICO Act was violated. While one might assume that the complained of acts would mirror those identified as relevant to the similar federal cause of action, the great breadth of the RICO statute renders this approach unacceptable.
>
> It is clear, however, that the *facts* underlying the predicate acts which give rise to the Georgia RICO claim are sufficiently alleged and, therefore, the claim should not have been dismissed.

(Citation omitted.) In a footnote, Schlanger also observes that "the barratry and false statements claim [sic] also lay the groundwork for two additional predicate acts under the Georgia RICO statute." These claims, however, also rely generally on the facts pled.

[98] Pelletier has submitted two briefs: an appellant's brief in appeal No. 89-8334 and an appellee's brief in appeal No. 89-8667.

conclusory manner, that the district court erred in rejecting his claims. In a sense, his briefs give less guidance as to which facts support which of his claims than do his complaints. They merely state in a conclusory fashion, as the complaints do, that Zweifel violated the law and then leave us with the task of combing the record to determine whether the district court erred as Pelletier contends. One could reasonably conclude, after reading Pelletier's briefs, that he takes neither of these appeals very seriously – that his briefs are simply "throw away" briefs.

In deciding whether Pelletier has prosecuted this case in bad faith, we have rejected the thought that his two complaints, and his briefs to us, might be the product of incompetent lawyering, and thus excusable, rather than tools of harassment. We have done so because Pelletier is skilled in the law, and, moreover, had been warned (through Schlanger) by a bankruptcy judge and a United States district judge that if he continued to pursue Zweifel, and his law firm, he was likely to run afoul of Rule 11. An indication of how far Pelletier was willing to go to extract a settlement from Zweifel is his allegation, in support of the federal RICO count of the original complaint, that Donald Rickertsen, the attorney who handled House of Travel's chapter 11 proceeding, and Frank Carmines and Charles Crumley, the examiner and auditor who were involved in that proceeding, conspired with Zweifel to conduct the affairs of the bankruptcy court, an alleged "enterprise," through a pattern of racketeering activity in violation of section 1962(d).[99] This allegation is

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[99] Pelletier also alleged, as part of his federal RICO count, that Zweifel, Rickertsen, Carmines, and Crumley, acting as

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absolutely baseless, and Pelletier knew this when he made it. The only reason Pelletier could have had for charging Rickertsen, Carmines, and Crumley with violating the federal RICO statute would be to bring about a quick settlement. Rickertsen, Carmines, and Crumley, concerned that being labeled RICO coconspirators might damage their professional reputations, would want the case terminated at the earliest moment, with as little publicity as possible, and they would put pressure on Zweifel to settle. When, however, Judge Tidwell told Schlanger that he was "treading on mighty dangerous grounds," a warning from which Zweifel could take comfort, Pelletier's chances for a quick settlement evaporated, and he abandoned his ploy. When he filed his amended complaint, he deleted his charge that Rickertsen, Carmines, and Crumley had conspired with Zweifel and used the bankruptcy court to violate the RICO statute.

Our conclusion that Pelletier brought this suit purely for the purpose of harassing Zweifel and forcing a quick settlement does not answer the question whether Schlanger has prosecuted this case in bad faith. We determine that he has done so, however, because he knew from the start that Pelletier's claims were frivolous. As we have

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coconspirators, also violated section 1962's substantive provisions – those contained in subsections (a), (b), and (c). As we note in the text *supra*, Pelletier alleged that Zweifel and his coconspirators used three enterprises – House of Travel, Lokey & Bowden, and the Bankruptcy Court for the Northern District of Georgia – as vehicles for violating all four criminal provisions of section 1962.

recounted, Schlanger's involvement with Pelleltier and House of Travel began in mid-January 1985 when Pelletier convinced him to represent the Hurst Group in its suit against Culpepper for the specific performance of Culpepper's promise to transfer 40 of his House of Travel shares to the Hurst Group. Pelletier explained the arrangement that he had made with the Hurst Group when he purchased its shares; he would prosecute the suit, and if the Hurst Group won, it would transfer to him the shares it received from Culpepper. Schlanger thereafter represented Pelletier and the Hurst Group, as Pelletier's nominee, in every facet of Pelletier's dispute with Culpepper, ending with the Elite transaction – when Pelletier sold his House of Travel shares and dismissed his suits against Culpepper. In sum, Schlanger knew as much as Pelletier did about the transactions that gave rise to this lawsuit; what he did not know from first hand observation – principally, the circumstances leading up to and surrounding Pelletier's transaction with the Hurst Group – he learned in full from Pelletier and his lawyers at Alston & Bird, Conner and Bassett. Schlanger consequently knew – well before he filed the original complaint in this case – that neither Culpepper nor Zweifel had defrauded Pelletier.

We recognize that sometimes the attorney's responsibility for his client's frivolous claims may be tempered by impediments to a thorough factual inquiry – a court, for example, in determining whether Rule 11 sanctions are warranted may consider whether the attorney accepted the case by referral from another member of the bar, the time he had to investigate the claims, the extent to which he was forced to rely on his client's version of

the facts, the complexity of the facts, and the extent to which factual development required discovery. *See supra* note 88. None of these impediments is present in this case;[100] Schlanger simply had no justification for presenting these frivolous claims to the district court. Schlanger, as noted, was intimately involved in most of the transactions and events that gave rise to this suit. He not only had adequate time to investigate Culpepepr's and Zweifel's conduct – he was an eyewitness to much of it; he was able to learn what had transpired without relying upon the credibility, or perceptiveness, of his client. *See Thomas v. Evans*, 880 F.2d at 1243.[101]

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[100] As we indicate in the text *supra*, Schlanger was not present when Pelletier and Culpepper met in December 1984 to discuss Pelletier's possible acquisition of the Hurst Group's stock, when the Pelletier/Hurst Group transaction closed, and at the January 8, 1985 meeting in Conner's law office, when Culpepper refused to sign the contract Conner had prepared. These events transpired before Schlanger came on to the scene in mid-January 1985. Schlanger, therefore, had to rely on Pelletier's and Conner's versions of these events and the letter Pelletier wrote to Bassett on January 9, 1985, explaining what had transpired on such occasions. These sources informed Schlanger that Pelletier had taken a calculated risk when he bought the Hurst Group's stock without first obtaining Culpepper's signature on a management contract. Schlanger thus knew that Pelletier had not relied on Culpepper's "promise" to give him control of House of Travel's affairs.

[101] Schlanger must have realized, when he filed the original complaint in this case, that if the case went to trial he would not be able to serve as Pelletier's trial counsel. ABA Model Rule of Professional Conduct 3.7 instructs attorneys not to serve as advocates in trials in which they are likely to be necessary witnesses except where their testimony relates to an

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2.

Monetary sanctions plainly are warranted in this case. All of the claims Pelletier made clearly fall below

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uncontested issue or the nature and value of the legal services rendered in the case, or their disqualification, as trial counsel, would work substantial hardship on their client. At a trial of Pelletier's claims, Schlanger's testimony would be necessary – either in the plaintiff's case, to prove Pelletier's claims, or in the defendant's case, to rebut those claims – in several material respects. For example, Schlanger was intimately involved in House of Travel's chapter 11 proceeding and the Elite transaction. He counseled Pelletier to ratify Culpepper's filing of the chapter 11 petition, and therefore knew that Pelletier could not have been injured as a result of Culpepper's action; he also negotiated, for Pelletier, the terms of the Pelletier/Elite/Carson/Culpepper contract, in which Pelletier agreed to the dismissal of the two state court suits he was prosecuting against Culpepper: the shareholders' derivative suit and the Hurst Group's suit for specific performance. Pelletier alleges, in his count one RICO claim, that Zweifel and his coconspirators, Culpepper and the others involved in the chapter 11 proceeding and the Elite transaction, defrauded him during the chapter 11 proceeding – by getting him to waive the Hurst's objection to Culpepper's commencement of the proceeding and, then, to sell his House of Travel shares to Elite. It is plain that Schlanger, having been intimately involved in these transactions, would have to testify at trial. First, Schlanger would have to testify that the filing of the chapter 11 petition caused Pelletier no injury – because he counseled Pelletier to consent to the filing. Second, Schlanger knew all of the facts material to the Elite transaction; hence, his client, Pelletier, could not have been fraudulently induced to consummate it.

Schlanger would also have been a likely witness on the question of whether the Hursts were acting as Pelletier's nominees or independently when they voted on the matters Schlanger had them bring before House of travel's board of directors

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the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that Pelletier's own evidence contradicted his factual allegations. If any doubt remained following discovery, it surely was removed when the Georgia Court of Appeals held that Pelletier had never been a House of Travel shareholder. *See supra* slip op. pp. 1633-1634, pp. ___ - ___.

We think that imposing sanctions in this case would serve the dual purpose of deterring the filing of frivolous claims and defenses while not chilling attorneys' legitimate enthusiasm and creativity in advancing legal and factual theories. At a time when the federal courts – which are a scarce dispute resolution resource, indeed – are straining under the pressure of an ever-increasing caseload, we simply cannot tolerate this type of litigation. Particularly with regard to civil RICO claims, plaintiffs

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in March 1985. Finally, Schlanger would have had to testify as to when he learned that the Hurst Group, whom he was ostensibly representing, had no House of Travel shares to sell to Pelletier on December 29, 1984, because they had already sold them to TI.

The record does not disclose whether Zweifel or the district court ever called Model Rule 3.7 to Schlanger's attention, so that Pelletier could obtain another attorney to substitute for Schlanger if the case went to trial. We simply have to assume that, had the matter proceeded to trial, the district court, if not Zweifel, citing Model Rule 3.7, would have asked Schlanger to step aside. At that point, whether Pelletier could have persuaded another lawyer – fully acquainted with the material facts – to take over the trial would be another question.

must *stop and think* before filing them. If used correctly, the civil RICO provisions may have many salutary effects. When used improperly, as in this case, those provisions allow a complainant to shake down his opponent and, given the expense of defending a RICO charge, to extort a settlement. Such improper use of the civil RICO provisions comes at the expense of the federal judiciary and those who need ready access to the courts.

The question arises as to whether the sanctions imposed in this case should fall on Pelletier and Schlanger equally or whether we should have the district court determine their relative culpability and apportion the sanctions between them. We conclude that Pelletier and Schlanger are equally culpable; therefore the sanctions should be borne by them equally – they should be liable, jointly and severally, for the full monetary amount of the sanction imposed. With respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs Zweifel may incur, on remand, in obtaining the award.

We acknowledge that the present predicament is, in part, the product of the district court's failure to require Pelletier to replead his case in accordance with the Federal Rules of Civil Procedure. In a case such as this one, the trial judge should intervene at the earliest possible moment in the proceeding and, faced with a complaint

such as the one filed here, should require that the plaintiff replead his entire case.[102] If he does not, the defendant, and the court, must decipher the pleadings as best they can – with the expenditure of much time and effort. Had, however, the district court required a repleader on all counts of the amended complaint, we are confident that Pelletier's case would have received the early demise it deserved.[103]

The district court's failure to require repleading in this instance does not, however, excuse, or mitigate, Pelletier and Schlanger's presentation of these unfounded claims. From the outset, they were warned that the claims were frivolous. As we have observed, one month after the complaint was filed, Judge Tidwell warned Schlanger that he was "treading on mighty dangerous grounds" and asked whether he was "familiar with Rule 11." Six months later, the bankruptcy court's special examiner

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[102] Similarly, the court should intervene and require a repleader when the defendant presents an answer or counterclaim that cannot be understood.

[103] If Pelletier had refused to comply with the court's direction to file a repleader in conformity with the rules of civil procedure, the court could have dismissed the complaint under Fed.R.Civ.P. 41(b), on the ground that Pelletier failed to comply with Fed.R.Civ.P. 8(a) and (e) to provide a short, clear and concise statement of the claim, Fed.R.Civ.P. 8(a), (e); *see Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985) (affirming dismissal of pleading that was long, confusing and conclusory); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir.1981) (affirming dismissal of pleading that was verbose, confusing and almost entirely conclusory); *Schmidt v. Herrmann*, 614 F.2d 1221 (9th Cir.1980) (district court properly struck pleadings where the pleadings were confusing, distracting and ambiguous).

filed his report. That report, which the bankruptcy court adopted, informed these litigants that they would run a substantial risk of incurring Rule 11 sanctions if they filed a suit based on claims essentially identical to the claims they have made here. Given these warnings, Pelletier and Schlanger must accept the full responsibility for their acts.

V.

Rule 38 of Federal Rules of Appellate Procedure provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." For the reasons stated in parts III and IV, we are convinced that Pelletier's appeal is frivolous. Of particular concern to us, in deciding whether Rule 38 sanctions are in order, is that Pelletier and Schlanger continued to press forward with their securities fraud claims, not only with no evidence of fraud, but also with compelling evidence that Pelletier never purchased any House of Travel stock – a purchase being an indispensable element of the claims. Pelletier was first put on notice when the Hurst Group could not give him a stock certificate after he purchased its House of Travel shares on December 29, 1984. Then, the Hurst Group, Schlanger's "client" at the time, received written notice on March 12, 1985 that TI was rescinding its stock purchase agreement. It may be that no member of the Hurst Group informed Schlanger of TI's notice, and that it had no stock to sell Pelletier on December 29, 1984, but certainly by the fall of 1987, when Zweifel discovered the TI sale and informed the district court, Schlanger, and thus Pelletier, knew that Pelletier's status as a House of

Travel stockholder was highly questionable. Any lingering doubts were dispelled by the Georgia Court of Appeals' decision, in Lokey & Bowden's appeal, in June 1989. In August 1989, however, while this case was pending on appeal, Schlanger, and Pelletier, continued to assert the securities fraud claims *without calling the Georgia Court of Appeals' decision to our attention*. Indeed, we did not learn about that decision until Zweifel mentioned it in his brief. At oral argument, Schlanger ignored the decision again, until he was asked about it by a member of this court. Only then did he admit that he had known of the decision (he had represented Pelletier in the Georgia Court of Appeals) and that, under principles of collateral estoppel, it rendered the securities fraud claims meritless.

We do not hesitate one whit in awarding Zweifel double costs and a reasonable attorney's fee for opposing Pelletier's appeal. *See* Fed.R.App.P. 38 advisory committee note. On remand, the district court shall determine the amount of that fee and give Zweifel judgment for the full amount thereof against Pelletier and Schlanger, jointly and severally.[104]

VI.

For the foregoing reasons, we affirm the district court's order granting summary judgment in favor of

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[104] In assessing the attorney's fee, the district court shall not compensate Zweifel for his attorney's services in prosecuting his appeal from the district court's order denying Rule 11 sanctions.

Gary Zweifel, reverse its order denying sanctions under Rule 11, and remand for further proceedings in accordance with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED with instructions.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8334 & 89-8667

RONALD O. PELLETIER,

Plaintiff-Appellant,

versus

GARY D. ZWEIFEL,

Defendant-Appellee.

(Filed MAR 29 1991)

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion January 29, 1991, 11th Cir., 19___, ___F.2d___).

Before: TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Proeedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	CIVIL NO.
vs.	:	1:86-CV-156-ODE
GARY D. ZWEIFEL	:	(Filed AUG 11, 1988)
	:	

ORDER

This action is before the court on motion by Defendant for summary judgment. Plaintiff charges that Defendant violated §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, the Georgia equivalent of §10(b) and Rule 10b-5, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As predicate acts under RICO Plaintiff alleges that Defendant engaged in mail fraud in violation of 18 U.S.C. §1341, wire fraud in violation of 18 U.S.C. §1343, fraud in violation of 18 U.S.C. §1952; bankruptcy fraud in violation of 18 U.S.C. §152, securities fraud under §10(b) of the Securities Exchange Act, and intimidation of a federal witness in violation of 18 U.S.C. §1503. Defendant moves for summary judgment on all of these claims.[1]

Plaintiff Ronald O. Pelletier is a former investor in Buckhead House of Travel, a travel agency. Defendant

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[1] In its order dated January 6, 1988, the court allowed Plaintiff to revive his claim of bankruptcy fraud, but denied Plaintiff leave to add a claim under the Georgia analog to RICO. Defendant filed a counterclaim for abuse of litigation under Georgia law, the substance of which is not addressed in the instant motion.

Gary D. Zweifel is an Atlanta attorney who at relevant times acted as counsel to Buckhead House of Travel. The gist of Pelletier's claims herein is that Zweifel knowingly aided C. M. Culpepper, president and part owner of Buckhead House of Travel, in deceiving Mr. Pelletier in connection with Pelletier's purchase of shares of stock in Buckhead House of Travel from Pelham H. Robinson, W. Leon Hurst, and William C. Hurst (hereinafter collectiveiy "the Hurst Group"). Because the record reflects that Pelletier's purchase of the Hurst stock occurred before he had any dealings with Zweifel, and also because the record reflects that Zweifel did not assist Culpepper in negotiating with Pelletier prior to Pelletier's purchase of the Hurst stock, Defendant's motion for summary judgment on the securities claims will be granted. Also, Defendant's motion will be granted as to Plaintiff's RICO claims for the reasons stated below.

In the late 1970's and early 1980's, the 100 outstanding shares of Buckhead House of Travel were owned equally by Clyde M. Culpepper and Leroy Langston.[2] Culpepper actively ran the business; Langston was inactive. Although the agency generated very substantial revenues, it was in a constant state of turmoil due to financial mismanagement by Mr. Culpepper. In the fall of 1983, one such financial emergency occurred when Culpepper was notified by IRS that the company owed $43,000 in overdue FICA taxes. Culpepper and Langston were unable to agree on a method of raising the cash for

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[2] Langston's wife had an interest in some of the shares; for ease of reference the shares will be referred to as belonging to Mr. Langston only.

IRS. Ultimately, Langston agreed that he would sell some of his shares to raise cash, so long as Culpepper would sell an equivalent number of his shares.

It is not clear how the Hurst Group, which then purchased shares, came in contact with Culpepper and Langston. In any event, on October 7, 1983, a written agreement was executed between Culpepper, Langston, and the Hurst Group whereby Culpepper and Langston each would sell 40 shares of stock to the Hurst Group. Shortly thereafter, Langston transferred his 40 shares in exchange for a check for the agreed purchase price. However, Culpepper made no transfer. It is unclear what happened; this issue has not been directly addressed in the parties' briefs. Culpepper's own version is that his inclusion in the contract of sale was merely a ruse to get Langston to sell his shares, and that the Hurst Group knew and agreed all along that Culpepper would not have to sell any shares. In any event, Culpepper remained as president of Buckhead House of Travel after October, 1983, and continued to run the business.

However, various emergencies occasioned by cash shortages continued to occur. The relationship between the Hurst Group and Mr. Culpepper was strained, to say the least. Each accused the other of acts of fraud and mismanagement. The situation was awkward, because the corporation was deadlocked. The Hurst Group had formed a liaison with Langston, but Culpepper still was the record owner of 50% of the shares.

In the fall of 1984, the Hurst Group negotiated with Wilbur Brown, the owner of a rival travel agency, to sell their shares in Buckhead House of Travel. At about the

same time, the Hurst Group asserted, through their attorney, that Culpepper had breached the October 7, 1983 contract to sell his shares to them. Culpepper consulted Defendant Gary D. Zweifel, partner with the Atlanta law firm of Lokey and Bowden concerning these allegations. Lokey and Bowden had been retained as corporate counsel for Buckhead House of Travel earlier in 1984. Lokey and Bowden had had nothing to do with the 1983 Hurst/Langston/Culpepper contract.

In September, 1984, Brown offered to buy Culpepper's shares. Culpepper and Zweifel indicated Culpepper would consider the matter.

On November 1, 1984, the Hurst Group executed an agreement whereby they sold all of their shares in Buckhead House of Travel to Travel Incorporated, Wilbur Brown's company. The contract expressly provided that if Brown was unable to effect a purchase of an additional 50% of the stock (presumably from Culpepper) within 180 days of his purchase of the Hurst Group's shares, Travel Incorporated would have the right to rescind. In the November 1, 1984 contract, the Hurst Group conditionally assigned to Travel Incorporated all causes of action they had against Culpepper growing out of the aborted 1983 transaction.

On November 9, 1984, two members of the Hurst Group filed suit against Culpepper in the State Court of Fulton County seeking both specific performance as to the 1983 agreement and damages against Culpepper. The record does not make it clear whether the filing of this suit was related to Wilbur Brown's stock purchase, but the court infers that it was.

Sometime in late November or early December, 1984, it became clear to Wilbur Brown that Culpepper was not going to sell his shares in Buckhead House of Travel. Accordingly, Brown contacted Pelham Robinson, a member of the Hurst Group, and told him they might as well go ahead and sell their stock to somebody else. At that point, the Hurst Group got in touch with Ronald O. Pelletier, Plaintiff herein. Mr. Pelletier, like Wilbur Brown, owned an interest in a rival travel agency.

Pelletier began negotiating with the Hurst Group and with Culpepper in mid-December, 1984. He offered to buy the Hurst Group's shares but not Culpepper's. He told Culpepper he was interested in buying the Hurst Group's shares, and would infuse capital into the corporation, but only if Culpepper would relinquish certain managerial and financial control functions. According to Pelletier, Culpepper verbally agreed to do this.[3] The record contains no evidence that Zweifel participated in any meetings at this point with Pelletier; the record reflects that Zweifel did not advise Culpepper in this matter prior to January 8, 1985.

On December 29, 1984, a written agreement between Pelletier and the Hurst Group was executed whereby the Hurst Group sold its 40 shares to Pelletier for $150,000.

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[3] Culpepper may disagree with Pelletier's version of these facts. Culpepper testified that (1) he first talked with Pelletier after Pelletier bought his stock; (2) he first talked to Pelletier when Pelletier had an option to buy the stock. Culpepper's deposition testimony does not specify exactly what, if anything, Culpepper felt he had agreed to do to induce Pelletier to buy stock.

Additionally, the Hurst Group assigned to Pelletier its causes of action in the then-pending state court law suit growing out of the aborted 1983 transaction. The agreement explicitly stipulated that it was not to be disclosed to Culpepper.

On January 8, 1985, Culpepper went to a meeting at the offices of Pelletier's counsel, Alston & Bird. Culpepper took Defendant Zweifel with him. Pelletier's counsel had prepared a draft of an agreement reflecting Culpepper's acquiescence in Pelletier's financial management of the corporation. Culpepper read the draft agreement, and refused to sign it.[4] This development angered Pelletier, who on January 3 had personally guaranteed a $100,000 line of credit for Buckhead House of Travel, $30,000 of which had already been drawn down.

The agreement which Culpepper refused to sign maintained him as titular president of the corporation, but drastically limited his prerogatives in financial matters. For example, he could not authorize payment of any expenses exceeding $1,000. The agreement fixed Culpepper's salary and reimbursable expenses at set amounts. It specifically provided that Culpepper's wife and son would continue as employees, but on specified terms and conditions, including that they each work at least 40 hours a week. The agreement called for Culpepper to warrant that he was the owner of 50 shares of stock in the corporation, and that the stock was free from claims by

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[4] Culpepper's deposition testimony suggests, but does not make clear, that he generally felt that the document gave too much control to Pelletier. Culpepper was not asked what specific parts of the proposal he objected to.

others.[5] Liquidated damages of $50,000 were specified should any of the representations be false.

Although the proposed agreement recited that it was in anticipation of the possibility that Pelletier might purchase the shares of the Hurst Group, in reality Pelletier had already bought the shares and was in a position to assert the rights of the Hurst Group to Culpepper's stock in the pending state court litigation. If Pelletier had been successful in this litigation, then he would own 80% of the shares, with Langston and Culpepper each owning 10%.

After the aborted January 8, 1985 meeting, accusations and counter accusations were swapped as between Culpepper and his counsel on the one hand and Pelletier and his counsel on the other hand. Several days after January 8, 1985, Pelletier announced to Culpepper and Zweifel that he had purchased the Hurst Group shares; he demanded to be recognized as a shareholder of record. At this point, Defendant Zweifel pointed out (correctly) that all of the shares of the corporation bore a restrictive legend such that under the charter and by-laws, the shares could be transferred only with the approval of 75% of the board of directors, which could not be obtained. The board only had three members: two members of the Hurst Group and Mr. Culpepper.

In mid-January, 1985, Pelletier and Langston filed a lawsuit in the Superior Court of Fulton County against the corporation, Culpepper, and William and Charles

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[5] Of course, Pelletier knew the stock was encumbered by the claims he had just purchased.

Hurst. The lawsuit sought the appointment of a receiver for the corporation, citing corporate deadlock; it sought the appointment of a provisional director and damages from Culpepper.[6]

On January 16, 1985, a temporary restraining order was entered against Buckhead House of Travel and Clyde Culpepper essentially enjoining them from dissipating corporate assets. The same day, a consent order was entered essentially reflecting the provisions of the previously entered restraining order and providing that Pelletier and those affiliated with him should have immediate access to the books and records of Buckhead House of Travel.

The discovery contemplated by the consent order did not go smoothly. For example, Pelletier's counsel were told while they were on the company premises on January 17 that they could not use the restroom, use the telephone, or have any coffee. They were relegated to an unheated room. Counsel for Buckhead House of Travel, Defendant Zweifel, placed various conditions on the review of records which had not been contemplated by the court order requiring that the documents be made available.

During February, 1985, various corporate meetings were attempted; none were successful due to the deadlocked status of the corporation.

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[6] Clyde Culpepper was represented in this lawsuit by Gary P. Bunch, an attorney with the law firm of Thrasher and Whitley, and also by Nickolas P. Chilivis, an attorney with the law firm of Chilivis and Grindler.

On March 13, 1985, an evidentiary hearing was held in the Superior Court of Fulton County on plaintiff's request for further temporary injunctive relief. The court entered an order which essentially relieved Mr. Culpepper of managerial control and appointed one James Lurwig to manage the company. Immediately after the court had announced its ruling, counsel for Buckhead House of Travel stated that it had just filed a bankruptcy petition for Buckhead House of Travel in the Bankruptcy Court for the Northern District of Georgia, seeking reorganization for the company. The corporate officer authorizing that decision was Clyde Culpepper.

Buckhead House of Travel was represented in the reorganization proceedings by Donald Rickertsen of the law firm of Bisbee, Parker and Rickertsen. Mr. Rickertsen prepared and filed the bankruptcy petition, and generally represented the debtor throughout the proceedings which concluded in 1986. In February, 1986, a plan of reorganization was confirmed by the bankruptcy judge. This plan called for all of the stock of Buckhead House of Travel to be transferred to a corporate purchaser which would pay $125,000 in cash. The bulk of Buckhead House of Travel's assets would be retained within the bankruptcy court's jurisdiction and liquidated for the benefit of Buckhead House of Travel creditors. The plan noted that the purchaser of the stock planned to operate a travel business and might employ Mr. Culpepper as a salesman. Apparently, the plan was consummated.

The following claims are now before the court on Defendant's motion for summary judgment. First, Plaintiff claims Defendant is liable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.

§1961 *et seq.* Secondly, he claims Defendant violated §10b(5) of the Securities Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, as well as the Georgia analog, O.C.G.A. §10-5-12(a)(2).

Plaintiff's referenced securities claims are premised on the theory that Clyde Culpepper made material misrepresentations to Pelletier in connection with Pelletier's purchase of the Hurst Group stock. Specifically, Pelletier contends that Culpepper misrepresented that he was willing to give up financial control of the corporation, when in reality he was not. Plaintiff then asserts that Defendant Zweifel, as counsel to Culpepper, knowingly aided Culpepper in perpetrating this deception.

Assuming that Culpepper in fact was seeking to deceive Pelletier so that Pelletier would infuse capital into the corporation, the record wholly fails to support Plaintiff's claim that Defendant Zweifel was a knowing participant in this scheme. All of the direct contacts which Pelletier had with Zweifel began on January 8, 1985, more than a week after Pelletier had purchased the Hurst Group stock and paid $150,000 for it. Secondly, the record simply does not support a contention that Zweifel gave Culpepper advice or assistance in any representations Culpepper may have made to Pelletier before Pelletier purchased the stock. Thus, it cannot be said that any misrepresentations for which Zweifel might be responsible were made "in connection with" Pelletier's purchase of the stock as the express language of the referenced federal and state statutes literally require. Furthermore, nothing that Defendant Zweifel did after he began dealing directly with Pelletier constituted misrepresentation, manipulation, or deception. While it is true

that Zweifel refused to cooperate with Pelletier, there was no actual or attempted misrepresentation involved.

The Plaintiff's argument appears to be that Defendant Zweifel must have realized that Culpepper had tricked Pelletier into buying the Hurst Group stock, once Zweifel learned of Pelletier's purchase. The reason Plaintiff argues Zweifel must have so realized is that Culpepper (presumably) had previously told Zweifel of the ruse perpetrated on Langston in 1983; Zweifel therefore was on notice that Culpepper probably was trying to trick Pelletier as well. Therefore, when Zweifel aided Culpepper by advising him at the January 8 meeting and by resisting the recognition of Pelletier as a shareholder of record, he committed securities fraud.

The court does not accept this reasoning. In the first place, as noted, Pelletier had already bought his stock; the actions taken by Zweifel did not affect that sale. Furthermore, even if Zweifel knew or suspected that Culpepper had tricked Langston in 1983, this would be insufficient to impart knowledge to Zweifel that the proposed written agreement reflected the terms of any verbal agreement Culpepper and Pelletier might have made previously. Zweifel had not been a party to the negotiations between Culpepper and Pelletier, and had no knowledge of the details.

Pelletier's RICO claims actually consist of four separate claims brought under each of the following sections: 18 U.S.C. §1962(a); 18 U.S.C. §1962(b); 18 U.S.C. §1962(c); 18 U.S.C. §1962(d). In essence, §1962(a) proscribes the use of funds derived from a pattern of racketeering activity in an enterprise; §1962(b) proscribes the maintenance of an

interest in an enterprise through a pattern of racketeering activity; in an enterprise through a pattern of racketeering activity; §1962(d) proscribes conspiracy to violate subsections (a), (b), or (c).

The term "pattern of racketeering activity" is a defined term under RICO. Specifically, 18 U.S.C. §1961(1) sets out precisely which criminal acts may be deemed "racketeering activity"; §1961(5) states that a "pattern" requires at least two acts of "racketeering activity."

The complaint herein alleges that Defendant Zweifel committed violations of the following criminal statutes which constitute acts of "racketeering activity" under §1961(1): 18 U.S.C. §1341 (mail fraud); 18 U.S.C. §1343 (wire fraud); 18 U.S.C. §1952 (use of interstate facilities to distribute proceeds of "unlawful activity" or to promote or carry on "unlawful activity"); 18 U.S.C. §152 (bankruptcy fraud).

Neither wire fraud nor mail fraud is a viable predicate act, *i.e.*, act of racketeering activity, for the instant RICO claims. That is because both wire fraud and mail fraud are premised on a knowing attempt to deceive. As previously stated, the record simply fails to support Plaintiff's claim that Mr. Zweifel knew facts which placed him on notice that Clyde Culpepper was seeking to swindle Mr. Pelletier, and that Zweifel then elected to assist Culpepper.

The alleged violations of 18 U.S.C. §1952 are not viable predicate acts because there was no "unlawful activity" as defined by 18 U.S.C. §1952(b). Plaintiff apparently asserts that Zweifel committed extortion, which does constitute "unlawful activity" for purposes of §1952,

but the record reflects that Zweifel did not extort any money or property from Pelletier, or assist Culpepper in doing so. The record is clear that the $150,000 was obtained by the Hurst Group, not by Culpepper or Zweifel. Neither did Zweifel assist the Hurst Group in any manner.

18 U.S.C. §152, proscribing concealment of assets, false oaths and claims and bribery in the context of a bankruptcy proceeding does not apply as a predicate act under the facts shown by the evidence. While Plaintiff contends that various individuals made misrepresentations to the bankruptcy court during the pendency of the proceedings, there is no evidence that Defendant Zweifel had any connection to any of them. Neither Zweifel nor Lokey and Bowden were active in the bankruptcy proceedings. Neither does the evidence permit an inference that Don Rickertsen, attorney for the debtor, was acting as a pawn for Lokey and Bowden or Defendant Zweifel.[7]

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[7] Plaintiff's first amended complaint also alleged a violation of 18 U.S.C. §1503 as a RICO predicate act. In its order entered January 9, 1987, the court dismissed the allegations of violation of §1503. It did so in error, as this section generally proscribes obstruction of justice, not merely tampering with a juror or court officer. The Plaintiff seeks to assert that Defendant Zweifel violated this section when he spoke harshly to Emily Langston, wife of Leroy Langston. Plaintiff's theory is that Zweifel should have realized that Mrs. Langston probably would be a witness in a legal proceeding affecting Buckhead House of Travel, and that he intended to intimidate her. However, to sustain a claim that Zweifel violated this statute, Pelletier would be required to show that Zweifel threatened Mrs. Langston "knowing of a pending judicial proceeding" in

(Continued on following page)

Because the record fails to support Plaintiff's claim that Defendant Zweifel committed any of the criminal acts which allegedly constitute a "pattern of racketeering activity," there is no "pattern of racketeering activity." Neither is there evidence that Zweifel agreed or attempted to commit a violation. Hence, there are no actionable RICO violations.

Because the evidence does not support Plaintiff's claims of securities fraud or RICO violations, Defendant's motion for summary judgment is GRANTED.

SO ORDERED, this 11 day of August, 1988.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

(Continued from previous page)

which she was likely to testify and "specifically intended to impede its administration." *United States v. Cuzzine*, 810 F.2d 687 (7th Cir. 1987). As there is no showing that Zweifel had any specific reason to think that Mrs. Langston was about to testify in a particular legal proceeding, and his remarks to her made no specific mention of any pending proceeding, there is no violation of this statute as a matter of law.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	CIVIL NO.
	:	1:86-CV-156-ODE
vs.	:	FILED
GARY D. ZWEIFEL	:	JUL 10 1989

ORDER

This civil suit for damages is before the court on Defendant's motion pursuant to Rule 11 of the Federal Rules of Civil Procedure for an award of reasonable attorney's fees and expenses. On August 11, 1988, this court entered summary judgment in Defendant's favor. Having read and considered the Defendant's motion and brief, as well as Plaintiff's response thereto, the motion is hereby DENIED.

Rule 11, Federal Rules of Civil Procedure, provides in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in

> violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Although the pivotal inquiry is whether Plaintiff's complaint as amended was, to the best of his attorney's knowledge, information and belief after reasonable inquiry "well grounded in fact and warranted by existing law", Defendant's motion does not specifically address this factor. Rather, Defendant's motion simply sets out his version of the facts which he believes compelled the conclusion that he was entitled to prevail. Defendant does not address exactly which of the facts set forth in Plaintiff's extremely fact specific complaint were wrong, or why Plaintiff's counsel should have known that they were wrong. Neither does he specifically point out any allegations in the complaint which are misleading by reason of omission of facts which should have been available to Plaintiff's counsel through reasonable inquiry. The court's impression is that many of the discrete facts specifically pled in the complaint are true; nonetheless, the inference sought by Plaintiff, namely, that the Defendant was a knowing participant in a fraudulent scheme along with one C. M. Culpepper, is not warranted by the evidence as presented by Defendant's motion for summary judgment and Plaintiff's response thereto. Plaintiff's theory seemed to be that because of actions of Defendant of an over-reaching nature, it could be inferred that he was

not merely acting as a professional advisor for Mr. Culpepper. However, there was no evidence that the Defendant participated in or had knowledge of the specific negotiations between Mr. Culpepper and the Plaintiff which were the basis for Plaintiff's claims of fraud. That being the case, the Defendant was entitled to the grant of the motion for summary judgment, but the Rule 11 motion must be denied.

The court can well understand the Defendant's outrage at being charged with being a "racketeer." However, Plaintiff cannot be faulted for the fact that Congress enacted legislation which allows such a claim to be made against an individual who by no stretch of the imagination would be thought of as a racketeer by any intelligent member of the public.

In summary, the Defendant's motion for Rule 11 sanctions is hereby DENIED.

SO ORDERED, this 10 day of July, 1989.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	CIVIL
	:	NO. C86-156
vs.	:	FILED
GARY D. ZWEIFEL	:	JAN 9 1987

ORDER

This case is before the court on Defendant's motion to dismiss the complaint, Defendant's motion to strike Plaintiff's first amended complaint, and Plaintiff's motion to lift stay of discovery and for a determination of sufficiency of the amended complaint.

Procedural Motions

Defendant urges the court to strike Plaintiff's first amended complaint on the grounds that Defendant's motion to dismiss the original complaint is already pending before the court and Plaintiff failed to seek leave of court or consent of Defendant to amend. However, Rule 15 of the Federal Rules of civil Procedure allows a party to amend his pleading once as a matter of course at any time before a responsive pleading is served. Fed. R. Civ.P. 15(a). No answer has been filed, and a motion to dismiss is not a "responsive pleading" within the meaning of Rule 15. *McGruder v. Phelps*, 608 F.2d 1023, 1025 (5th Cir. 1979). Plaintiff was therefore entitled to amend his complaint. Defendant's motion to strike will be denied.

Alternatively, Defendant has renewed his motion to dismiss as to Plaintiff's amended complaint. That motion will be considered below. Plaintiff's motion to lift the stay

of discovery which was imposed pending a ruling on Defendant's motion to dismiss will be granted, and Plaintiff's motion for determination of the sufficiency of the amended complaint will be dismissed as moot.

Motion to Dismiss

This matter arises out of a series of financial transactions involving an Atlanta travel agency, Buckhead House of Travel, Inc. ("Buckhead Travel"). Plaintiff Ronald O. Pelletier became a shareholder in Buckhead Travel in 1984. At that time, Defendant Gary D. Zweifel served as legal counsel to both Buckhead Travel and its president, Mr. C. M. Culpepper. Both in 1984 and subsequently, a dispute existed as to who owned the controlling interest in Buckhead Travel. The dispute had originated in certain unusual circumstances and transactions beginning in 1983 before either Defendant Zweifel or Plaintiff Pelletier had any relationship to Buckhead Travel. At the point when Mr. Pelletier purchased his stock, plus certain rights to other shares which were then in litigation, he considered that he was the majority (80%) owner. However, Mr. Culpepper asserted that he owned 50% of the outstanding stock and that Pelletier owned only 40% of the shares.

Plaintiff Pelletier alleges that Defendant Zweifel became actively involved in a fraudulent scheme to keep Mr. Culpepper in control of Buckhead Travel. Plaintiff contends that he sustained serious financial damage as a result of Defendant's actions, including the loss of his investment in the agency. The complaint includes allegations of RICO violations, securities fraud, intimidation of

witnesses, barratry, mail and wire fraud, and other claims. Federal jurisdiction is based on Plaintiff's RICO count.

Defendant has moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that each count fails to state a claim upon which relief can be granted.

Count One of the complaint alleges violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.* Plaintiff alleges nine types of statutory violations by Defendant as the predicate acts for his RICO claim. Amended Complaint, ¶¶264-274. Defendant has moved to dismiss the RICO count on the grounds that the allegations of predicate acts are insufficient to state a claim against him and fail to show that he engaged in a pattern of racketeering activity.

Defendant is correct as to certain of the alleged predicate acts. Defendant could not be indicted for conspiracy to extort under color of official right, 18 U.S.C. §1951, because Defendant and his alleged conspirators are not public officials and are not alleged to have influenced public officials.[1] Plaintiff's claim that Defendant acted in violation of 9 U.S.C. §152 fails because no such statute exists. The complaint fails to allege a violation of 18 U.S.C. §1503 because there are no allegations here that Defendant threatened or injured a juror or officer of a United States Court. The alleged violations arising under

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[1] *See United States v. Scacchetti*, 668 F.2d 643, 647 (2d Cir.), *cert. denied*, 457 U.S. 1132 (1982); *United States v. Lena*, 497 F. Supp. 1352, 1359 (W.D. Pa. 1980), *aff'd*, 649 F.2d ___ (3d Cir. 1981).

O.C.G.A. §§16-10-95, 16-10-20 and 16-10-93 are not permissible predicate acts under the federal RICO statute, 18 U.S.C. §1961(1). O.C.G.A. §16-10-95 prohibits intentionally filing an action without authorization; O.C.G.A. §16-10-20 prohibits knowingly giving a false statement in a matter within the jurisdiction of a government agency; and O.C.G.A. §16-10-93 prohibits the threatening of witnesses. While Plaintiff alleges that these offenses were committed as part of an effort to commit extortion, which is a RICO predicate act, the state offenses themselves do not include extortionate activity as required elements. Accordingly, the court grants Defendant's motion as to Count One to the extent of striking therefrom subparagraphs c, e, f, g, and i. Otherwise, the court finds that the predicate acts alleged in Count One are properly pled. Because this leaves two or more alleged predicate acts, and the complaint alleges other required elements under RICO, the motion to dismiss Count One will therefore be denied.

Count Two alleges violations of §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder, 15 U.S.C. §78j(b). Defendant moves to dismiss on particularity grounds. However, Plaintiff's amended complaint adequately sets forth Defendant's alleged involvement in various misrepresentations and coercive actions during the course of sale of Buckhead Travel shares. The complaint meets the threshold standards of Rule 9(b) of the Federal Rules of Civil Procedure. Defendant's motion to dismiss will therefore be denied as to Count Two.

Count Three alleges violations of §12(1) and (2) of the Securities Act of 1933, 15 U.S.C. §77*l*(1) and (2).

Defendant moves to dismiss on the grounds that Plaintiff has failed to allege or demonstrate that he is a "seller" of securities within the meaning of §12. While it is true that an attorney may be considered a "seller" if he assumes an active negotiation role, *Junker v. Crory*, 650 F.2d 1349, 1360 (5th Cir. 1981), the complaint affirmatively demonstrates that neither of Mr. Zweifel's clients, Mr. Culpepper or Buckhead Travel, offered or sold securities to Plaintiff Pelletier. Rather, the complaint alleges that Mr. Pelletier purchased securities from the Hurst group. Accordingly, the motion to dismiss is granted as to Count Three.

Count Four alleges violations of §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a). Defendant moves to dismiss on the grounds that §17(a) does not establish a private right of action. The court agrees. *See In re North American Acceptance Corporation Securities Cases*, 513 F. Supp. 608, 618 (N.D. Ga. 1981). Defendant's motion to dismiss will therefore be granted as to Court Four.

Defendant's motion to dismiss counts Five, Six, Seven and Eight for lack of particularity is granted as to Counts Six, Seven and Eight, but denied as to Count Five. Count Five is based on Georgia's §10(b) analogue, O.C.G.A. §10-5-12(a)(2), and it is reasonably clear from the complaint as a whole what claimed acts give rise to the cause of action, and what claimed damages Plaintiff was caused thereby. However, Counts Six and Seven simply allege violation of Georgia criminal statutes, O.C.G.A. §16-10-95 (barratry) and O.C.G.A. §16-10-20 (knowingly giving a false statement with respect to a matter within the jurisdiction of a government agency), and those counts fail to allege civil causes of action. Count Eight alleges a violation of the Georgia RICO Act, O.C.G.A.

§16-14-1, *et seq.*, but does not allege how the Georgia RICO Act was violated. While one might assume that the complained of acts would mirror those identified as relevant to the similar federal cause of action, the great breadth of the RICO statute renders this approach unacceptable.

Summary

Defendant's motion to strike is DENIED. Defendant's motion for a determination of the sufficiency of the amended complaint is DISMISSED AS MOOT. Defendant's motion to dismiss is GRANTED as to Counts Three, Four, Six, Seven and Eight of the complaint. Otherwise it is DENIED. Plaintiff's motion to lift stay is GRANTED.

SO ORDERED, this 9 day of January, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED JAN 6 1988

RONALD O. PELLETIER	:	
	:	CIVIL NO.
vs.	:	1-86-CV-156-ODE
GARY D. ZWEIFEL	:	

ORDER

This case is before the court on Defendant's motion under Fed.R.Civ.P. 56(e) and 16 for leave to file a supplemental affidavit and supporting papers in support of his motion for summary judgment; Plaintiff's motion for leave to file a second amended complaint; and pursuant to the parties' joint request to file certain exhibits and depositions for use in connection with Defendant's motion for summary judgment and Plaintiff's response thereto.

Defendant and Plaintiff have presented to the court certain depositions and exhibits relied upon in connection with the motion for summary judgment. The Clerk is directed to file same.[1]

Next, the court turns to Defendant's separate motion under Fed.R.Civ.P. 56(e) and 16 for leave to submit a supplemental affidavit and supporting papers in support of his motion for summary judgment, and to amend the

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[1] It appears the deposition of Donald Rickertsen has not been presented for filing. The Defendant may file the deposition of Donald Rickertsen with the Clerk within 15 days of date of entry of this order.

pretrial order by adding these documents to the list of potential trial exhibits. Defendant seeks to submit the affidavit of Wilbur L. Brown, in which Mr. Brown contends that he purchased all of the Buckhead House of Travel (BHT) stock owned by W. Leon Hurst, W. Charles Hurst and Pelham H. Robinson (collectively "the Hurst Group"), in November of 1984. The affidavit is accompanied by several documents tending to prove that such a transaction did in fact take place. In this action Plaintiff claims to have purchased these same shares from the Hurst Group in early 1985. Thus, Defendant claims that Brown's prior purchase will eliminate Plaintiff's standing to bring many of the claims presented in his complaint, as well as bolster Defendant's claims that certain conduct on his part was justified. Defendant also seeks to reopen discovery in order to depose other people who have knowledge of the alleged Brown-Hurst transaction.

Although it is unclear why the information proffered by Defendant did not come to light earlier, the facts presented in his motion appear highly material. Thus Defendant's motion will be granted. Discovery will be reopened and extended for forty-five (45) days from date of entry of this order. On the day discovery expires, or within fifteen (15) days thereafter, Plaintiff may file a supplemental brief in opposition to the motion for summary judgment. Defendant will then have ten (10) days to respond thereto. The supplemental affidavit and supporting exhibits presented concurrently with Defendant's instant motion will be accepted for filing.

Finally, Plaintiff seeks to amend his complaint for a second time.[2] The proposed amendment seeks to tailor Plaintiff's claims to the facts allegedly revealed during discovery. Only one change sought by the Plaintiff presents an additional claim. In count five of the Plaintiff's proposed second amended complaint, Plaintiff seeks to assert a claim for breach of fiduciary duty and negligence. Plaintiff originally brought this same claim against Defendant Zweifel in a separate action which was remanded to a state forum by this court more than one year ago. Plaintiff admits that this same claim is still pending in state court.

It is not appropriate at this late date to amend the complaint again. To the extent that Plaintiff seeks to alter the factual allegations in support of his various claims, he may do so by amending the statement of facts in his portion of the pretrial order. Plaintiff will not be allowed to raise a duplicative state law claim, or to revive a claim under the Georgia RICO Act at this late point in the litigation.

One change will be allowed. In his first amended complaint, Plaintiff attempted to set forth a colorable claim of bankruptcy fraud under 18 U.S.C. § 152, as a predicate act in support of his federal RICO claim. This claim was dismissed because of Plaintiff's typographical error; he asserted that Defendant violated a nonexistent statute. The court now vacates that portion of its January 9, 1987 order dismissing Plaintiff's claim of bankruptcy

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[2] This motion was filed on the same day as Defendant's motion for summary judgment and the parties' pretrial order.

fraud. Plaintiff will be allowed to proceed with a claim that Defendant violated 18 U.S.C. § 152, and that this conduct constituted a predicate act under RICO.

To conclude, the parties' joint request for leave to file certain depositions and exhibits is GRANTED. The Clerk is DIRECTED to file the following documents:

1. Letter to the court from Herbert Schlanger, counsel for Plaintiff, dated November 12, 1987

2. Letter to the court from Robert Hicks, counsel for Defendant, dated November 12, 1987

3. The following depositions:

Adams, Marjorie B.
Bassett, Peter Q.
Bowden, Henry L.
Bunch, Gary P.
Conner, Frank M.
Cooper, Frederick
Culpepper, C.M.
Handley, Gerald F.
Hurst, W. Leon
Jackson, Brant, Jr.
Pelletier, Ronald O.
Rickertsen, Donald
Robinson, Pelham
Rollins, James H.
Schlanger, Herbert P.
Zweifel, Gary D.
Charles M. Lokey
Hamilton Lokey
Sidney O. Smith
Richard Young

4. Defendant's exhibits Volumes I-IV, consisting of exhibits nos. 1-151.

Defendant's motion under Rules 16 and 56(e) to file a supplemental affidavit and to reopen discovery is

GRANTED. Plaintiff's motion for leave to file a second amended complaint is DENIED. That portion of the court's January 9, 1987 order dismissing Plaintiff's claim under 18 U.S.C. § 152 is VACATED. Finally, the court's ruling on Defendant's motion for summary judgment is DEFERRED. The Clerk is DIRECTED to resubmit the Defendant's motion for summary judgment in seventy (70) days.

SO ORDERED, this 5 day of January, 1988.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE
ENTERED ON DOCKET

JAN 11 1988

L.D.T. CLERK

BY

DEPUTY CLERK

(2)

No. 91-3

Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

RONALD O. PELLETIER, et al.,

Petitioners,

v.

GARY D. ZWEIFEL,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT E. HICKS
ROBERT A. BARTLETT
Attorneys of Record for Gary D. Zweifel

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QUESTION PRESENTED FOR REVIEW

Respondent respectfully objects to the Questions which Petitioners assert are presented for review in this matter, and states, instead, the following:

1. Where the Court of Appeals, based upon a *plenary* and *de novo* review of the *entire record* from the District Court, and *considering the undisputed material facts in a light most favorable to Petitioners*, determined that: (a) the district court had properly granted Respondent's motion to dismiss certain of Petitioners' claim for failure to state a claim, and had further properly granted Respondent's motion for summary judgment as to the remaining claims, concluding that Petitioners' factual allegations were frivolous; (b) further determined that Petitioners, both of whom are attorneys, and both of whom participated in the transactions out of which these claims purportedly arose, knew at the time they brought the claims that they were frivolous, and that the complaint was brought and pursued by them in bad faith and vexatiously purely to harass Respondent and to extract a settlement from him; (c) further determined that Petitioners' appeal to the grant of Respondent's motions to dismiss and for summary judgment was frivolous under Rule 38 of the Federal Rules of Appellate Procedure ("App. Rule 38"); and (d) further determined that the district court had abused its discretion in failing to determine, upon Respondent's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") to which Petitioners had the full and complete opportunity to respond, that Petitioners had violated

QUESTION PRESENTED FOR REVIEW – Continued

Rule 11, and in failing to impose sanctions against Petitioners – did the Court of Appeals improperly exercise its authority in: (a) concluding that the record before it demonstrated beyond any question that Rule 11 sanctions were in order, and that Petitioners should be liable for those sanctions jointly and severally; and (b) determining what the nature of those sanctions should be, and remanding the matter to the district court with the direction to impose sanctions in an amount equal to the reasonable attorneys fees, expenses of litigation, and court costs incurred by the Respondent in his defense, and in pursuing his motion for sanctions?

LIST OF INTERESTED PERSONS

The following is a complete list of persons and entities with an interest in the outcome of this litigation:

Trial Judge:	Hon. Orinda P. Evans
Petitioners:	Ronald O. Pelletier Herbert P. Schlanger
Respondent:	Gary D. Zweifel
Petitioner Pelletier's Counsel:	Herbert P. Schlanger
Petitioner Schlanger's Counsel:	Mark I. Harrison The law firm of Harrison, Harper, Christian & Dicher
Respondent's Counsel:	Robert E. Hicks Robert A. Bartlett The law firm of Hicks, Maloof & Campbell, A Professional Corporation
Other entities with an interest:	The law firm of Lokey & Bowden

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OPINIONS BELOW

Petitioners have included in the Appendix to their Petition (the Appendix) copies of the Opinions entered by the district court and the Court of Appeals which are pertinent to their Petition.

JURISDICTION OF THIS COURT

Respondent acknowledges that this Court has jurisdiction to consider the Petition.

STATUTES AND RULE PROVISIONS INVOLVED

In addition to the provisions of the Federal Rules of Civil Procedure cited and quoted by Petitioners, Respondent respectfully advises the Court that the following statutes and rules are also involved in this matter, the text of which, in accordance with Rule 14.1(f) & (k) of this Court, are set forth in Respondent's Appendix hereto: Title 28, United States Code, Section 2106; Rule 38, Federal Rules of Appellate Procedure; Rules 12(b)(6), 43, and 78, Federal Rules of Civil Procedure; Rules 220-1, and 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia.

STATEMENT OF THE CASE

A. Introduction.

After an exhaustive *plenary* and *de novo* review of the record which had been amassed in the district court, consisting of two large boxes of exhibits and nine volumes of the record on appeal, the Eleventh Circuit Court of Appeals (the "Court of Appeals") concluded that the district court had properly granted Respondent's motions to dismiss and for summary judgment, and further concluded that the Petitioner Ronald O. Pelletier ("Petitioner Pelletier" or "Pelletier"), himself a lawyer, owner of a

company conducting a bar review course, and sophisticated businessman, and Petitioner Herbert P. Schlanger, his counsel ("Petitioner Schlanger" or "Schlanger") (both of whom are hereafter called "Petitioners"), had engaged in egregious conduct in violation of the standards imposed by Rule 11 and App. Rule 38 in bringing and pursuing, in bad faith and vexatiously, baseless claims against Respondent, who is also a lawyer, and was, for a time, counsel for their quarry in the transactions in which these baseless claims purportedly arose.

The Court of Appeals further determined that this conduct warranted the imposition of sanctions against Petitioners, jointly and severally, measured by the reasonable attorney's fees, expenses of litigation, and court costs incurred in Respondent's defense against their baseless claims in the district court, pursuing his motion for sanctions, and opposing their appeal to the district court's grant of his motions to dismiss and for summary judgment.

The Court of Appeals then remanded this case to the district court for a determination of the amount of those reasonable fees and expenses. Petitioners do not contest the determinations of the Court of Appeals as to Respondent's motions to dismiss and for summary judgment, or the imposition of sanctions upon them under App. Rule 38.

The printed opinion of the Court of Appeals, *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), runs for 58 pages (141 pages in the Appendix to the Petition), and the recitation of the facts contained in the record by which the claims of Petitioners are determined to be baseless consumes 25 of those pages. *Id.* 1470-1495. (63 pages in the Appendix-App.4-67). Moreover, these facts are also interspersed throughout the remainder of the Court of Appeals' opinion as it analyzes Petitioners' claims, determines them to be baseless, and explains its reasoning and

supports its conclusions as to Petitioners' violations of Rule 11 and App. Rule 38, and the bases to support its determinations regarding the nature of the sanctions warranted by their conduct.

In analyzing these claims, the Court of Appeals, as Respondent before it, was confronted with the necessity of sifting through many subsidiary facts to ascertain that the conclusory allegations stated in Petitioners' complaint had no factual predicate, and that because of their intimate involvement in the transactions in which the claims asserted against Respondent purportedly arose, Petitioners knew their claims had no merit when they brought the complaint. A detailed examination of these subsidiary facts also revealed to the Court of Appeals that Petitioners brought the complaint and pursued this action in bad faith, and for the purpose of harassing Respondent, with the hope and expectation that they would force him to a quick settlement in an attempt to buy back his good name.[1]

Throughout the history of this case, Respondent, and the various federal and state courts which have addressed this controversy, have been confronted with many impertinent and immaterial allegations from Petitioners which are irrelevant to the legal issues involved, unsupported by the record, waste valuable judicial resources, and have caused Respondent to incur fees and costs to refute. Notwithstanding that Petitioners have not

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[1] A good name, of course, cannot be bought or sold.

> Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.

Shakespeare: *Othello*, Act III, scene iii, l. 151

challenged the correctness of the rulings of the Court of Appeals that all of their claims lack merit either because they failed to state claims or that there were no facts to support them, Petitioners continue to assert these baseless, impertinent, and irrelevant allegations before this Court. Respondent objects to, and refutes, the allegations regarding the history of this matter which Petitioners set forth as "fact" that are inconsistent with the facts as determined from the record by the Court of Appeals, and, instead, respectfully refers this Court to the Court of Appeals' recitation of the pertinent facts. Considering the volume of these subsidiary facts, which consume 67 printed pages of the Appendix, it would be difficult, if not impossible, to recite all of them in the body of this Response. Rather, Respondent will provide this Court with a synopsis of the more pertinent facts regarding the history of proceedings in this case, and the subsidiary facts which support the Court of Appeals' determination that in bringing and pursuing this matter Petitioners acted in bad faith, vexatiously, and with intent to harass Respondent into a quick settlement.

B. Course of Proceedings and Dispositions Below.

Petitioners filed the initial complaint against Respondent on January 30, 1986, asserting, in broad and general terms, conclusory allegations that Respondent committed violations of Sec. 10b of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder (15 U.S.C. § 78j(b), the Georgia Securities Act (O.C.G.A. § 10-5-12(a)(2)), the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 *et seq.*), and a number of pendent state law claims. The complaint sought substantial compensatory damages in excess of $1 million dollars, and punitive damages of approximately $2 million dollars. Petitioners had the complaint served on Respondent at the bankruptcy court at the conclusion

of a hearing in the related case of Buckhead House of Travel, Inc. ("BHT") in which Respondent and his law firm, Lokey & Bowden, successfully obtained relief from an order which had been previously entered by the bankruptcy court, without notice to them, purporting to assign to Pelletier claims of BHT against Respondent and Lokey & Bowden.

Respondent filed a motion to dismiss the complaint and all of its counts under Fed.R.Civ.P. 12(b)(6). At the first hearing conducted in this case less than one month after filing the initial complaint, the district court warned both Petitioners that they were "treading on mighty dangerous grounds" with the allegations of the complaint, and inquired of Schlanger, in the presence of Pelletier, "Are you familiar with Rule 11?" Schlanger replied that he was familiar with Rule 11 and did not think he was violating it, stating, "we have got more facts on this case than any . . . RICO case I know that's been filed in this court." Schlanger asserted "that [Respondent] joined with Mr. Culpepper in an ongoing scheme to keep Mr. Culpepper in an ongoing scheme in control of [BHT], and the result of that since it was carried out through a series of criminal acts is that Mr. Pelletier lost $250,000." The Court inquired, "Why have you just named one as a defendant?" to which Schlanger responded that some question of a release of Culpepper existed "and he [Culpepper] doesn't have any money anyway." The district court observed that he " . . . thought that solvency might have something to do with it." Without ruling on Respondent's motion to dismiss, the district court further admonished Petitioners that the pivotal allegations of the complaint constituted nothing more than conclusions that would have to be repled if they intended to proceed.

Before the district court ruled on Respondent's motion to dismiss, Petitioners filed an amended complaint, which was 70 pages and over 240 paragraphs and

contained 8 counts seeking the same multi-million dollars in damages. The amended complaint was accompanied by four volumes of exhibits – 123 exhibits – and was over five (5) inches thick. Respondent renewed his motion to dismiss the amended complaint, and the district court partially granted Respondent's motion, dismissing a substantial number of Petitioners' federal and state claims under Rule 12(b)(6) for failure to state a claim. The district court allowed to stand Count One (RICO), Count Two (§ 10b and Rule 10(b)(5) securities violations), and Count Five (Georgia's § 10(b) analog), without requiring Petitioners to replead those counts, on the basis that the amended complaint contained *allegations* sufficient to meet the threshold standards of Fed.R.Civ.P. 9(b).

After the district court's order allowing these claims to stand, Respondent answered and counterclaimed for abusive litigation. Discovery proceeded at an intense pace. Numerous depositions were taken, and several motions supported by memoranda, briefs and responses were filed.

After the conclusion of discovery, and the submission of a comprehensive pre-trial order, in August, 1988 – two years and eight months after this action was brought – the district court granted Respondent's motion for summary judgment on all of Petitioners' remaining claims.

Respondent thereafter filed his motion for sanctions pursuant to Rule 11, seeking to recover as sanctions against Petitioners the attorney's fees incurred in his defense through the grant of his motion for summary judgment. Respondent also filed supplemental supporting material establishing the reasonableness of those attorney's fees. Respondent also submitted his bill of costs to the district clerk. Petitioners responded to the motion, disputing Respondent's entitlement to sanctions; however, they did not dispute the reasonableness of the attorneys' fees incurred by Respondent, and did not present any evidence to the district court by affidavit or

otherwise in response to the motion. Petitioners also did not dispute the bill of costs, which were then taxed by the district clerk.

Petitioners timely filed their notice of appeal to the judgment on the Order granting Respondent's motion for summary judgment, and to the district court's earlier order partially granting Respondent's motion to dismiss.

The district court entered an Order denying Respondent's motion for sanctions, and Respondent timely filed his notice of appeal to said Order, which appeal was heard jointly by the Court of Appeals along with the appeal filed by Petitioners.

Oral argument was held on these consolidated appeals on December 12, 1989, and on January 29, 1991, the Court of Appeals issued its opinion in which it determined, in pertinent part: (a) that the district court had correctly granted Respondent's motions to dismiss and for summary judgment, but had erred in failing to grant Respondent's motion to impose sanctions against Petitioners under Rule 11; (b) that the claims brought by Petitioners against Respondent were frivolous when brought, and became even more so as discovery proceeded, and that said claims were intentionally brought and pursued in bad faith; (c) that monetary sanctions pursuant to Rule 11 were appropriate in this case, that they should be imposed jointly and severally against Petitioners, and that the district court should, upon receipt of the Court of Appeals' mandate, award to Respondent a sum of money that would compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions, including any fees, expenses, and costs Respondent might incur, on remand, in obtaining the award; and (d) that the appeal pursued by Petitioners in connection with the Order granting Respondent's motions to dismiss and for

summary judgment was frivolous under App. Rule 38, and that Respondent was entitled to an award of fees and costs under App. Rule 38, and that on remand the district court should determine the amount of that fee and give Respondent judgment for the full amount thereof against Petitioners, jointly and severally, but should not compensate Respondent for his attorney's services in prosecuting his appeal from the District Court's order denying Rule 11 sanctions.

After denying Petitioners' motion for rehearing limited to that portion of its opinion pertaining to Rule 11 sanctions, the Court of Appeals issued its mandate to the District Court, together with a copy of its opinion.

Respondent then amended his motion for sanctions to include additional attorneys fees, expenses of litigation, and court costs consistent with the opinion of the Court of Appeals, and after giving Petitioners an opportunity to respond to this amended motion, the district court conducted a hearing in accordance with the mandate of the Court of Appeals. During the course of that hearing, Petitioners confirmed that they were asserting no objection to the reasonableness of the attorneys' fees, expenses of litigation, or court costs sought by Respondent.

C. Statement of Facts.

The following facts are provided to the Court as the facts upon which, in addition to the facts set forth above, the Court of Appeals based its determination that the claims of Petitioners were meritless, were known by Petitioners to be so at the time they filed the complaint, and were brought in bad faith and vexatiously purely to harass Respondent and to extract a settlement from him.

Lokey & Bowden, the law firm of which Respondent was a member, was retained to represent BHT in early September 1984 by its founder, President, Chairman of its

board of directors, and shareholder, C. M. Culpepper ("Culpepper"). Contrary to the suggestion of Petitioner, unsupported by the facts, Lokey & Bowden and Respondent did not represent BHT prior to September. At that time, Petitioner was not involved in the affairs of BHT. Lokey & Bowden represented BHT for several months, until it withdrew as counsel for BHT on or about March 12, 1985.

BHT had several other shareholders in addition to Culpepper. Among them were Messrs. W. Leon Hurst, W. Charles Hurst, and Pelham Robinson (the "Hursts"). On or about November 1, 1984, the Hursts sold all of their stock in BHT to Wil Brown & Sons d/b/a Travel, Incorporated ("Travel, Inc.") in a transaction which was later rescinded, but which was in effect during the period of time relevant to this matter.

In late 1984, Pelletier embarked upon a scheme to takeover BHT and merge it with another travel agency which he already owned. On or about December 29, 1984, he entered into a transaction with the Hursts in which they purported to sell their BHT stock to him. As a part of this transaction, the Hursts secretly tendered their resignations from the board of directors to Pelletier; and agreed not to sign any documents that would bind BHT without obtaining Pelletier's consent. The Hursts also agreed to assign to Pelletier their purported claims against Culpepper for an additional 40% of the stock of BHT by means of a so-called "Litigation Agreement," and agreed to allow Pelletier to hire and pay for a lawyer to represent his interests, while appearing to represent their interests in BHT. That lawyer was Schlanger, who later represented Pelletier both in this case, and in a related case brought against Lokey & Bowden and Respondent in the State Court of Fulton County, Georgia (hereafter the "State Court Action"). This Litigation Agreement was first disclosed when Petitioners attached it as one of the many exhibits to the amended complaint.

Before entering into the transaction with the Hursts, Pelletier told one of his attorneys, Frank M. Conner, III ("Conner") that based upon information he had received he did not trust the Hursts, and instructed Conner to prepare the documents with that in mind. Pelletier described the situation existing at BHT at that time as one of mutual distrust between warring factions. When asked why he went through with the transaction, he stated that he was motivated by "fear and greed" – meaning that he was afraid that if he didn't move quickly he would lose the opportunity to acquire stock which he thought was worth $650,000 for $150,000, because he felt that Culpepper was at the limit of being able to endure the situation, and would probably have dealt with someone else and taken less.

After signing his agreement with the Hursts, Pelletier told Conner to draft a proposed management agreement to present to Culpepper, which was to include a provision transferring managerial and financial control of BHT from Culpepper to Pelletier. The preamble of the agreement drafted by Connor included representations that Pelletier " . . . was in the process of consummating the acquisition of 40 shares . . . " from the Hursts, and that " . . . prior to consummating the acquisition of the shares it is necessary for Pelletier to enter into an agreement with Culpepper outlining certain conditions and agreements with respect to the continued operations and management of [BHT] . . . " This proposed agreement also required Culpepper to affirmatively represent that there were no outstanding claims to his shares, and that in the event this representation was false, Culpepper would owe Pelletier $50,000.00 as liquidated damages. Conner acknowledged that if Culpepper had signed the agreement as drafted he could have been liable for the $50,000.00. Conner also acknowledged that Pelletier did not want Culpepper to know that Pelletier had already entered into an agreement with the Hursts, and Pelletier

acknowledged that he wanted to leave the impression that he was not yet a stockholder of BHT.

On January 8, 1985, Pelletier met Respondent for the first time at a meeting at the offices of Pelletier's attorneys. At that meeting, Respondent was presented with a copy of the proposed management agreement. Respondent reviewed the proposed management agreement, and observed that there was no consideration in the agreement flowing to BHT. Culpepper reviewed the proposed management agreement and concluded that "even a five year old wouldn't sign that thing." Culpepper refused to sign the proposed management agreement. As a result of the information provided at the meeting, Respondent was under the impression that Pelletier was not yet a stockholder of BHT; but, rather, was merely negotiating with the Hursts to buy their stock.

The next day Pelletier set upon a course to pressure Culpepper to turn over operational control of BHT. He wrote a letter to another one of his attorneys, Peter Q. Bassett (hereafter "Bassett"), stating that he wanted to move aggressively toward taking over BHT. Among other things, he asked Bassett to consider: a derivative action against Culpepper to be brought by Langston on grounds of misfeasance and RICO; " . . . as economic pressure, have several of the corporate lenders place Buckhead in default . . . ;" and sit on the resignations of the Hursts and allow them to continue functioning within the business of BHT as officers and employees. Pelletier also observed that "Having to deal with Robinson and Hurst is probably the greatest pressure we can place on Culpepper. Economic pressure would come a close second."

Pelletier enclosed with this letter a statement of facts, which included the following comments: the Hursts had tendered their resignations contingent upon Pelletier's obtaining an agreement with Culpepper; the current status at BHT was bleak, with employees seeking to leave

and take accounts with them; and the Hursts were willing to support Pelletier's position, since, "[t]hey are, of course, fearful of any criminal action for their transgressions."

On January 16, 1985 Pelletier, represented by Bassett, brought suit in Fulton County Superior Court (hereafter the "Superior Court Case") against BHT, Culpepper, and two of the Hursts, represented by Schlanger – whose fees Pelletier was *secretly* paying and whose actions Pelletier was *secretly* controlling. In the Superior Court Case, Lokey & Bowden represented BHT, and Culpepper was represented by a lawyer named Gary P. Bunch. At the same time, Schlanger, at the direction of Pelletier, but in the name of the Hursts, brought suit against Culpepper in the United States district court, in which Culpepper was also represented by Bunch.[2]

Pelletier, through Connor, demanded transfer of the Hursts' stock on BHT's records into his name, but instead of a stock certificate he produced an affidavit stating that the Hursts had lost their stock certificate. Respondent, as corporate counsel to BHT, advised the Hursts and Pelletier that before BHT could act on this demand, it needed some further assurances and protection, including a bond to indemnify the corporation against loss in the event someone else claimed an ownership or security interest in that stock. Neither Pelletier nor the Hursts ever responded to this request. Pelletier did not then disclose, and claimed later that he did not know, that the Hursts had previously sold their BHT stock to Travel, Inc.

For the next three months, Lokey & Bowden, through Respondent and his partners Hamilton Lokey and Gerald

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[2] Pelletier later hired Bunch to represent him in a lawsuit against the Hursts for alleged securities fraud in the sale of their BHT stock to him.

Handley, defended BHT in the Superior Court case, and attempted to provide general corporate representation to BHT in a hostile environment, which involved the secret agreement between Pelletier, the Hursts whose resignations Pelletier held, and Schlanger, who appeared to represent the Hursts while secretly being paid by Pelletier and representing his interests.

In March 1985, Lokey & Bowden and Respondent terminated their representation of BHT, and BHT filed for bankruptcy. Before that occurred, however, Schlanger, secretly acting on behalf of Pelletier, brought a motion in the name of the Hursts in the Superior Court Case seeking a preliminary injunction to have Pelletier's nominee placed in control of BHT. This motion followed a purported Board of Directors meeting at which the Hursts voted, among other things, to fire the law firm of Lokey & Bowden. The Hursts' votes at this meeting were controlled by Pelletier, who used Schlanger to hold up cards saying "yes" and "no." In spite of the purported firing, Schlanger thereafter served his motion upon Lokey & Bowden as counsel for BHT. Out of an abundance of caution, and in an effort to discharge their responsibilities as officers of the court, Respondent's partners Hamilton Lokey and Gerald Handley of Lokey & Bowden appeared at this hearing to report their status to the court; however they did not address the merits of Schlanger's motion. Bunch did not appear at that hearing. At the conclusion of the hearing, the superior court granted the relief sought by Schlanger secretly on behalf of Pelletier.

While the superior court hearing was proceeding, attorney Donald Rickertsen filed a Chapter 11 petition for BHT in the bankruptcy court. Rickertsen believed that Culpepper had the authority to sign that petition. The superior court order placing Pelletier's nominee in control of BHT was made the order of the bankruptcy court by consent of Pelletier and others. Except for filing a proof of claim against BHT for unpaid fees, Lokey &

Bowden and Respondent had no role in, nor significant contact with BHT's bankruptcy case for months after its commencement.

During BHT's bankruptcy case, Pelletier entered into an agreement with Culpepper and others in which he "sold" the stock he claimed to have purchased from the Hursts, and took an assignment of any claims BHT had against Lokey & Bowden and the Hursts. Schlanger openly became Pelletier's attorney in obtaining the claims against the Hursts and Lokey & Bowden. Rickertsen's law firm filed an objection to Pelletier's application to the bankruptcy court to obtain approval of this agreement, stating that the claims could not be assigned under Georgia law, the assignment created an appearance of impropriety, and was not authorized under the Bankruptcy Code. A hearing was held on Pelletier's application, and Rickertsen requested that Respondent and Hamilton Lokey be present as witnesses in opposition to transfer of BHT's claims against the Hursts. Though not called as witnesses, Lokey and Respondent wrote to the bankruptcy judge explaining the facts known to them regarding BHT's claims against the Hursts. Neither Lokey nor Respondent were advised of the ultimate result of Pelletier's efforts until the middle of December, 1985, when Respondent inquired of Rickertsen what had happened, and Rickertsen told Respondent that the assignment of claims against the Hursts had been deleted, but the assignment of claims against Lokey & Bowden had been approved. Upon hearing that, Lokey & Bowden filed a motion to vacate the bankruptcy court Order approving said assignment.

Thereafter, Schlanger, on behalf of Pelletier, filed the State Court Action against Lokey & Bowden and Respondent alleging malpractice and breaches of fiduciary duties purportedly owed to Pelletier by Respondent and

Lokey & Bowden in connection with his claimed purchase of BHT stock from the Hursts. The Georgia Court of Appeals ultimately concluded that the undisputed material facts established that Pelletier was not a stockholder of BHT, and could not bring an action against Lokey & Bowden and Respondent. *Lokey & Bowden v. Pelletier*, 192 Ga.App. 470, 385 S.E.2d 90 (Ga.App. 1989). The Georgia Supreme Court denied Pelletier's Petition for Writ of Certiorari as to this decision. *Id.*

The bankruptcy court conducted a hearing on Lokey & Bowden's motion to vacate the order purporting to assign BHT's "claims" against them to Pelletier, and granted that motion at the conclusion of the hearing. At that time, Petitioners had the complaint in this case served upon Respondent in the bankruptcy court.

After this case had been commenced, and after the district court had admonished Petitioners that they were treading on mighty dangerous grounds and to familiarize themselves with Rule 11, Petitioners filed an application in the bankruptcy court to authorize Pelletier to pursue BHT's claims against Lokey & Bowden. The bankruptcy court appointed attorney John J. Goger (hereafter "Goger") as special counsel to investigate the substance of any claims which BHT might have against Lokey & Bowden, and to analyze the value, if any, of allowing Pelletier to pursue any such claims. Goger, after conducting an extensive investigation, filed his report in the bankruptcy court, concluding that the claims against Lokey & Bowden had no merit, and the risk of an abusive litigation counterclaim and/or Rule 11 sanctions were far greater concerns. The bankruptcy court conducted a hearing on Pelletier's application to pursue claims, denied that application at the conclusion of the hearing, and thereafter entered an order in accordance with this oral ruling.

REASONS FOR DISALLOWANCE OF THE WRIT

A. The Court of Appeals, Using its Knowledge of the *Undisputed Material Facts* Gained from its *Plenary* and *De Novo* Review of the *Entire Record* in this Case, Which was Before It in Connection with the District Court's Grant of Respondent's Motions to Dismiss and For Summary Judgment, Properly Concluded that Petitioners had committed Egregious Rule 11 Violations and should be Sanctioned for Those Violations Jointly and Severally.

The Court of Appeals reviewed Petitioners' appeal from the district court's grant of summary judgment in favor of Respondent using a standard of review which was *plenary* and *de novo*, employing the same legal standard as used in the district court – whether Respondent was entitled to judgment as a matter of law based upon the material facts as to which there was no genuine dispute. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); and *Carlin Communication v. Southern Bell*, 802 F.2d 1352 (11th Cir. 1986).

The Court of Appeals conducted a similar *plenary* and *de novo* review as to Petitioners' claims which had been dismissed for failure to state a claim under Rule 12(b)(6), again employing the same legal standard as used by the district court – whether it appeared beyond doubt that Plaintiff could prove no set of facts in support of the claims that would entitle him to relief. *Harris v. Kerner*, 404 U.S. 519, 520-21 (1972); and *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986). Since discovery had been completed, and a substantial factual record had been developed which contained the purported factual predicate for Petitioners' claims, the legal standard for the review of the district court's grant of summary judgment was also applicable to these claims. *Celotex, supra; Ross v. Bank South*, 837 F.2d 980, 998-99 (11th Cir. 1988).

Using these standards, and conducting a thorough and sifting review of the entire record, the Court of Appeals concluded that Petitioners' claims had no merit, and affirmed the district court's grant of Respondent's motions to dismiss and for summary judgment, after reading Pelletier's complaint "in the light most favorable to him, with respect to the claims dismissed under Fed.R.Civ.P. 12(b)(6), and giving him the benefit of every reasonable inference, with respect to the claims disposed of on summary judgment under Fed.R.Civ.P. 56." *Pelletier v. Zweifel*, 921 F.2d at 1470.

In considering Respondent's cross-appeal from the district court's denial of his motions for sanctions, the Court of Appeals, citing this Court's opinion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S ___, 110 L.Ed. 2d 359, 110 S.Ct. ___ (1990), acknowledged that it should apply an abuse of discretion standard in reviewing all aspects of the district court's Rule 11 determinations, and that it could reverse the district court only if it found that the district court had abused its discretion. *Pelletier v. Zweifel*, 921 F.2d at 1514.

Using this abuse of discretion standard in the context of having the *entire record* of this case before it, and applying the *undisputed material facts* which established that Respondent was entitled to judgment as a matter of law on *all* of Petitioners' claims, the Court of Appeals determined that the district court had abused its discretion in failing to conclude that Petitioners' conduct violated Rule 11, because it based its ruling on an erroneous view of the law and on a clearly erroneous view of the evidence. *Id.* at 1514. In so concluding, the Court of Appeals observed that the district court had failed to conduct a searching inquiry into the merits of Petitioners'

complaint, and as a result of such failure, the district court developed a clearly erroneous view of the evidence. *Id., Cooter & Gell*, 496 U.S. at ___, 110 L.Ed. 2d at 380.

Using the comprehensive knowledge which it had gained from its own *plenary* and *de novo* review of the entire record of this case, the Court of Appeals concluded that Petitioners' complaint had no reasonable factual basis when pled, that Petitioners knew this, and that when they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith. *Id.* at 1515. In support of these conclusions, the Court of Appeals recapitulated some of the evidence which it had earlier recited. In applying the objective standards for determining reasonableness under Rule 11,[3] and construing the evidence most favorably to Petitioners,[4] the Court of Appeals stressed the following facts, among others.

– Pelletier was a lawyer skilled in the law; had been a member of the Georgia bar for nearly 10 years at the time the suit was brought; and had established a Georgia bar review course. *Id.* at 1515, 1519-20.

– Pelletier's claim that he relied on Culpepper's purported promise to turn over control of BHT to him, and that he was defrauded by Culpepper's alleged refusal to

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[3] *See*, for example, *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *Thomas v. Evans*, 880 F.2d 1235, 1243 (11th Cir. 1989); *Adamson v. Brown*, 855 F.2d 668, 673 (10th Cir. 1988); *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1980); and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

[4] *See*, for example, *Pelletier v. Zweifel*, 921 F.2d at 1497, n.7, where the Court of Appeals states: "Again, for the sake of showing that Rule 11 sanctions are justified, we make these assumptions in Pelletier's favor."

do so (with Respondent's purported conspiratorial assistance) "borders on the preposterous." Rather, the undisputed facts establish that Pelletier expected Culpepper to renege, and took several steps to protect himself, including: keeping his deal with the Hursts to purchase their BHT stock secret from Culpepper and Respondent; making a secret side agreement with the Hursts to control their litigation against Culpepper and their votes as directors of BHT (thereby putting himself in a position to get Culpepper to act by his own misstatements); beginning a campaign to harass Culpepper into submission by causing BHT to go into default with its lenders, and by commencing litigation; and hiring Schlanger to secretly represent his interests while pretending to represent the Hursts. *Id.* at 1515, 1474-79.

– Schlanger became a part of Pelletier's scheme no later than mid-January 1985 (a few days after Pelletier first met Respondent). He was advised of the matters that had occurred prior to his involvement both by Pelletier, and by the lawyers who had been representing Pelletier in his dealings with Culpepper and in the litigation Pelletier was pursuing and intending to pursue against Culpepper. From that time forward, Schlanger represented Pelletier and the Hursts as Pelletier's nominee in all facets of Pelletier's dispute with Culpepper, and knew from first-hand observation, as much as his benefactor/client Pelletier, what the true facts were. "He not only had adequate time to investigate Culpepper's and Zweifel's conduct – he was an eyewitness to much of it; he was able to learn what had transpired without relying upon the credibility, or perceptiveness, of his client." *Id.* at 1520-21, 1478-1488.

– Pelletier and Schlanger both knew, well before they brought the complaint, that Respondent had not defrauded Pelletier, but, rather, had, *under the view of the*

evidence most favorable to Petitioners, merely advised a client not to sign an agreement that was one-sided and had no consideration flowing to that client. *Id.* at 1516, 1474-76.

– Each count of Petitioners' original complaint was objectively frivolous when filed. *Id.* at 1517, n. 91, 1495-1513.

– Petitioners were warned by the district court within several weeks after the filing of the original complaint that they "were treading on mighty dangerous grounds" and should acquaint themselves with Rule 11, and that the pivotal allegations of the complaint constituted nothing more than conclusions that would have to be repled. *Id.* at 1492, 1518, 1520

– Instead of abandoning their claims, Petitioners repled the complaint, and in doing so engaged in the same sort of "shot-gun" approach used in the original complaint, "replete with factual allegations that could not be possibly material to any of the causes of action they assert." The differences between the two complaints consisted, essentially of the expansion of the numbered paragraphs from 141 to 241, and four volumes of exhibits were attached to the amended complaint (making the document over five inches thick). The Court of Appeals expressly noted that it undertook the task of deciphering the amended complaint by referring to the four volumes of exhibits, and found that none of the claims had merit. *Id.* at 1517-19.

– In addition to the admonition from the district court, an independent special counsel appointed by the bankruptcy court to examine into claims which Petitioners sought to have assigned to Pelletier, and which were substantially identical to those being pursued in this case, concluded that the possibility of litigation sanctions against the bankruptcy estate of BHT, including Rule 11

sanctions, were sufficiently great not to allow the undertaking of such claims, and the bankruptcy court concurred in such report after a hearing attended by Petitioners, yet instead of abandoning their claims, they continued to press them. *Id.* at 1493-94, 1516.

– Petitioners failed to call to the attention of the Court of Appeals the ruling in the Georgia Court of Appeals that Pelletier never became a stockholder of BHT. This failure to disclose by Petitioners was also cited by the Court of Appeals as a ground for imposing sanctions against them under App. Rule 38, an action about which Petitioners do not complain in their Petition. *Id.* at 1510-11, 1521, 1523.

Based upon these, and other actions of Petitioners, who were themselves participants in the transactions in which they falsely claimed that Respondent had committed serious acts of criminal misconduct, the Court of Appeals concluded that Petitioners had no basis in fact for bringing their claims, that they were brought in bad faith, vexatiously, and for the improper purpose of harassing Respondent, and to extract a settlement from him. *Id.* at 1515, 1517. The Court of Appeals further concluded that Petitioners were responsible for egregious violations of Rule 11, and that because of their joint participation in the activities which occurred both before and after the filing of this action, Petitioners were jointly and severally liable for the sanctions to be imposed under Rule 11. *Id.* at 1522.

Respondent respectfully submits that based upon the undisputed material facts which were before the Court of Appeals, and applying the deferential standard for review of the district court prescribed by *Cooter & Gell, supra,* the Court of Appeals correctly decided these matters.

B. The Court of Appeals Acted Properly in Determining, on the Record Before It, the Nature of the Rule 11 Sanctions to be Imposed Upon Petitioners, and in Remanding This Matter to the District Court for a Determination of the Amount of Those Sanctions.

It is clear that monetary sanctions measured by the attorney's fees and litigation expenses incurred by the opposing party are, if the circumstances warrant, appropriate sanctions under Rule 11. *Donaldson v. Clark*, 819 F.2d 1551, 1556-58 (11th Cir. 1987) (en banc); *Cooter & Gell*, 496 U.S. at ___, 110 L.Ed. 2d at 374. *See, also, Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), applying this concept to an award of attorney's fees in Title VII cases.

The cases cited by Petitioners in support of their argument that the Court of Appeals should not have determined the nature of the sanction appropriate for their conduct in this case, or that the Court of Appeals should have remanded the case to the district court to allow further evidence in "mitigation" of this sanction, do not refute the concept of the use of monetary sanctions for deterrence; indeed, those cases support that concept. *See*, for example, *In re Kunstler*, 914 F.2d 505, 522-23 (4th Cir. 1990); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 193 (3rd Cir. 1988); *Matter of Yagman*, 796 F.2d 1165, 1184-85 (9th Cir. 1986); *White v. General Motors Corp., Inc.*, 908 F.2d 675, 683-84 (10th Cir. 1990); *Blue v. Dept. of Army*, 914 F.2d 525, 547 (4th Cir. 1990).

The essence of Petitioners' argument is that the Court of Appeals should not have determined the nature of the sanctions to be imposed, but, rather, should have remanded the matter to the district court to give that court another opportunity to take evidence of "mitigating circumstances" that could, according to Petitioners, have some impact upon the amount of the sanctions to be

imposed against them. In making this argument, Petitioners gloss over several factors which establish that this case is not in conflict with the cases cited by Petitioners, and that based upon the specific factual context of this case, those cases are distinguishable.

First, Petitioners gloss over the fact that when this matter was before the district court on Respondent's motion for sanctions, Petitioners failed to avail themselves of the opportunity to submit any evidence to support their belated plea for mitigation. Under Local Rules 270-1 and 220-1 of the United States District Court for the Northern District of Georgia, which are reprinted in the Appendix hereto, parties against whom a motion seeking attorney's fees has been filed must respond in writing within ten (10) days after the service of that motion, and failure to file a response indicates that there is no opposition to the motion. Local Rule 270-1 on the determination of attorney's fees refers to and incorporates the applicable provisions of Fed.R.Civ.P. 43(e), and 78, and reading these various rules *in pari materia* with each other establishes that if parties against whom attorney's fees are sought have matters to present to the district court in opposition to the relief sought, then they must do so by presenting evidence in the form of affidavits or live testimony, depending upon how the court considers the matter. In this case, the district court considered the matter on the written submissions of the parties, which included affidavits submitted by Respondent to establish the reasonableness of the attorney's fees incurred in his defense, and which included a brief from Petitioners, a copy of which is reprinted in the Appendix hereto, which did not address the "mitigating circumstances" which they now claim an entitlement to present. If the district court had ruled, in the first instance, in the manner which the Court of Appeals concluded was required by the undisputed

evidence of record, then Petitioners, having had both the opportunity and the obligation to present such matters to the district court, surely would not have been heard to complain that they did not have their day in court. Since the Court of Appeals merely performed the function which the district court should have performed, but failed to do so, using the same record and the same *undisputed material facts* which were available to the district court, and the same record, including Petitioners' response to Respondent's motion for sanctions, Petitioners have not been deprived of an opportunity to present matters to the district court, *they* merely *failed to do so.* Indeed, the Court of Appeals did remand this matter to the district court for the determination of the reasonable attorney's fees, expenses of litigation, and court costs incurred by Respondent, and Petitioners again waived their opportunity to contest those matters.

In making their argument, Petitioners also ignore the fact that the Court of Appeals had before it the *entire record* of the district court on a *plenary* and *de novo* review, applying the *undisputed material facts* in the record, in connection with Petitioners' appeal from the district court's orders granting Respondent's motions to dismiss and for summary judgment. Under this procedural posture, in ruling on the district court's disposition of Respondent's motion for sanctions, the Court of Appeals was perfectly capable of determining the appropriate form that the sanctions against Petitioners should take. Indeed, the posture of this case before the Court of Appeals put it in an even better position than the district court in assessing Respondent's motion for sanctions, since the district court, out of procedural necessity, had to take up piece-meal and *seriatim* the various motions in this case which were, instead, presented to the Court of

Appeals in consolidated fashion. Moreover, it is significant to note that none of the matters before the Court of Appeals, or the district court before it, required the determination of credibility or the weighing of the sufficiency of evidence; rather, the record, and the issues, before the district court and the Court of Appeals were identical.

In *Cooter & Gell*, this Court observed that the issues involved in determining whether an attorney has violated Rule 11 involve "fact-intensive close calls," and if a Court of Appeals, using a deferential standard, concluded that a district court had relied upon a materially incorrect view of the law or had based its findings on an erroneous view of the law, then the Court of Appeals would be justified in setting aside the district court's ruling. *Id.* 496 U.S. at ___, 110 L.Ed 2d at 380. In emphasizing the benefit of such a deferential rule, this Court stressed that giving the district court the discretion to resolve questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization" in the Rule 11 context would "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." *Id.* 496 U.S. at ___, 110 L. Ed 2d at 381.

Unfortunately, in this case the pursuit by Petitioners of their appeal from the district court's grant of Respondent's motions to dismiss and for summary judgment multiplied, rather than reduced, the underlying litigation; and the failure of the district court, as determined by the Court of Appeals using a deferential standard, to apply the proper discretionary standards to Petitioners' conduct in bringing and pursuing their baseless claims in bad faith, vexatiously, and for the purpose of harassing

Respondent, has spawned, rather than reduced, satellite litigation.

28 U.S.C. § 2106 provides, in pertinent part, that this Court and the Court of Appeals have the power to reverse any judgment or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate order or judgment or require such further proceedings as may be just under the circumstances. This authority has been interpreted by this Court and the Court of Appeals to include the power, in a case before an appellate court on undisputed facts where the appellate court is in the same position as would be the court below, to resolve an issue which was not decided below due to the lower court's erroneous determination of a preliminary issue, and to dispense with the need for further evidentiary hearings if no legitimate purpose would be served thereby. *See*, for example, *Hormel v. Helvering*, 312 U.S. 552, 556-557 (1940); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971); *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 29 (1983); *Forman v. United States*, 361 U.S. 416, 425 (1960), reh. den. 362 U.S. 937, ovrld. on other grounds *Burks v. United States*, 437 U.S. 1 (1978); *Steinfeld v, Zeckendorf*, 239 U.S. 29, 30 (1915); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990); *Joshi v. Florida State University Health Center*, 763 F.2d 1227, 1236 (11th Cir. 1985).

In this case, the Court of Appeals, being required to conduct a thorough and sifting analysis of the entire record in connection with Petitioners' appeal, concluded, based upon the *undisputed material facts* of record that Petitioners' claims had no merit, and due to Petitioners' intimate involvement in the transactions from which the purported claims against Respondent arose, that Petitioners knew that these claims had no merit. The Court of Appeals further concluded, based upon the conduct of

Petitioners also disclosed in the *undisputed material facts* of record, that in bringing and pursuing this case Petitioners acted in bad faith and vexatiously for the purpose of harassing Respondent and hoping to extract a settlement from him. The Court of Appeals further concluded that Petitioners were aware when they filed the initial complaint that their claims lacked merit, and were forcefully reminded thereafter by a United States district judge and a bankruptcy judge that they could be subject to Rule 11 sanctions for bringing and pursuing these claims, yet they persisted in doing so.

Respondent respectfully submits that under the fact specific circumstances of this case, the Court of Appeals had the authority to weigh and consider the *undisputed material facts* before it in connection with its *plenary* and *de novo* review on related matters in determining the proper sanction, rather than sending the case back to the district court for yet another round of "satellite litigation."

Petitioners certainly have no claim that they were not on notice of the potential for Rule 11 sanctions, and, indeed, beginning no later than several weeks after this case was filed they began their futile effort to support and justify these claims, only to see their "facts" evaporate under the scrutiny of discovery and the thorough and sifting analysis performed by the district court and the Court of Appeals. Having been on such notice, and having had their day in court to present matters in mitigation if such were relevant, they should not now be heard to complain.

Considering the egregious facts and circumstances of Petitioners' Rule 11 violations as determined by the Court of Appeals from its review of the *undisputed material facts* of record, the Court of Appeals was authorized to determine that the appropriate sanction to be imposed upon Petitioners, jointly and severally, was to reimburse

Respondent for the attorney's fees, expenses of litigation, and court costs incurred by him in his defense in the district court and in the pursuit of his motion for sanctions. Notwithstanding their failure to present any evidence of "mitigating circumstances" in the district court in response to Respondent's motion for sanctions, any such evidence would pale into insignificance considering their egregious conduct in the underlying transactions and in the bringing and pursuit of this lawsuit falsely accusing Respondent of serious acts of criminal misconduct.[5]

Moreover, the Court of Appeals did provide Petitioners with the opportunity to challenge the reasonableness of the attorney's fees, expenses of litigation, and court costs which Respondent did incur, and Petitioners have chosen not to do so.

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[5] In testifying by affidavit as to the reasonable attorney's fees in this case, Mr. Joseph Lefkoff, a well-respected member of the Georgia Bar, stated, in pertinent part, as follows:

> I personally know the Defendant, Gary D. Zweifel, and my firm has been employed by him from time to time in the representation of him in fiduciary matters where he often acts. It is my belief that a substantial part of his practice relates to fiduciary law, frequently in circumstances where he must be bonded.
>
> When allegations of willful and intentional fraud are made against an attorney with respect to acts performed by him in his professional capacity, his reputation and livelihood are put dramatically in issue. I cannot conceive of a more particularly damaging circumstance for an attorney than to be sued for racketeering, and only a criminal RICO action would be worse than the civil action filed in this case by the Plaintiff against Gary D. Zweifel.

C. Due to the Fact Specific Nature of the Decision of the Court of Appeals, This Court Should Not Consider This Case on *Certiorari*

In determining that the district court had abused its discretion in failing to conclude that Petitioners' conduct violated Rule 11 because it based its ruling on an erroneous view of the law and on a clearly erroneous view of the evidence, the Court of Appeals had conducted its own thorough and sifting review of the *undisputed material facts* of this case, and concluded that Petitioners had committed egregious violations of Rule 11 warranting the imposition of sanctions measured by the attorney's fees and expenses incurred by their opposing party as a result of their conduct. If this Court were to review the decision of the Court of Appeals, it would be required to conduct its own thorough and sifting review of those facts, because the action of the Court of Appeals, and its determination as to the severity of the conduct warranting sanctions, and the proper sanction to be imposed, are integrally entwined in the facts. Historically, this Court has refrained from granting *certiorari* to review evidence and discuss specific facts, or the inferences from the evidence. *See*, for example, *United States v. Johnston*, 268 U.S. 220, 227 (1925); and *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938).

CONCLUSION

Respondent, himself a lawyer, became embroiled in this litigation through no fault of his own, and was the victim of a scheme perpetrated by Petitioners to use the federal court system to harass him into paying money to buy back his good name by filing baseless claims with a significant *in terrorem* impact. Although this scheme may have slipped past a district court harried with the crush of day-to-day litigation, it did not pass the scrutiny of the

Court of Appeals which had the opportunity, given Petitioners' appeal from the grant of Respondent's motions to dismiss and for summary judgment, to review the *undisputed material facts* in a reflective environment in conjunction with Respondent's motion for sanctions. As determined by the Court of Appeals, the conduct of Petitioners represented an "improper use of the civil RICO provisions" in an attempt to "shake down" an opponent and "extort a settlement" at the "expense of the federal judiciary and those who need ready access to the courts." *Pelletier v. Zweifel*, 921 F.2d at 1522. The action of the Court of Appeals in this case was appropriate. Considering the fact specific nature of this case, it is not an appropriate candidate for *certiorari*. This Court should deny Petitioners' writ.

Respectfully submitted,

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Appendix

28 U.S.C. § 2106 ..... App. 1

Rule 38, Federal Rules of Appellate Procedure .. App. 1

Rule 12(b)(6), Federal Rules of Civil Procedure .. App. 1

Rule 43(e), Federal Rules of Civil Procedure .... App. 1

Rule 78, Federal Rules of Civil Procedure ..... App. 2

Local Rule 220-1, U.S.D.C.N.D.Ga ..... App. 2

Local Rule 270-1, U.S.D.C.N.D.Ga ..... App. 3

Response of Plaintiff to Defendant's Motion for Sanctions, filed in the district court on March 16, 1989 ..... App. 5

STATUTES AND RULE PROVISIONS INVOLVED

Title 28, United States Code, Section 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Rule 38, Federal Rules of Appellate Procedure:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages, and single or double costs to the appellee.

Rule 12(b)(6), Federal Rules of Civil Procedure:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . A motion making any one of these defenses shall be made before pleading if a further pleading is permitted. . . .

Rule 43(e), Federal Rules of Civil Procedure:

> **(e) Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matters on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Rule 78, Federal Rules of Civil Procedure:

> Unless local conditions make it impracticable, each district court shall establish regular times and places, at such intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge may at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.
>
> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Rule 220-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Filing of Motions and Responses; Hearings:

> **(a) Filing of Motions.**
>
> (1) Every motion presented to the clerk for filing shall be accompanied by a memorandum of law citing supporting authorities and, when allegations of fact are relied upon, by supporting affidavits. Motions not in conformance with this rule shall not be accepted for filing.
>
> (2) Specific filing times for some motions are set forth below. All other motions must be filed WITHIN 100 DAYS after the complaint is filed, unless the filing party has obtained prior permission of the Court to file later.
>
> **(b) Response to Motion.**
>
> (1) Each party opposing a motion shall serve his response, responsive memorandum, affidavits, and any other responsive material not

later than ten days after service of the motion, except that in Cases of motion for summary judgment the time shall be twenty days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

(2) Although a reply by the movant shall be permitted, it shall not be necessary for the movant to file a reply as a routine practice. When the movant deems it necessary to file a reply brief, that brief shall be served not later than ten days after service of the responsive pleading. No further briefs may be filed by the parties, except upon order of the Court.

(c) Hearings. All motions shall be decided by the Court without oral hearing unless a hearing is ordered by the Court.

Rule 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Attorney's Fees – Procedure for Determination:

If a final judgment, including a judgment made final under F.R.Civ.P. 54(b), does not determine (or establish the procedures for determining) the amount of attorney's fees which are authorized by federal statute to be awarded by the Court to or on behalf of a prevailing party or which may be sought under the equitable or inherent powers of the Court, the following procedures shall apply:

(1) The award of such fees (and expenses incident thereto not ordinarily allowable as taxable costs) shall be requested by special written motion addressed to the Court and shall not be included in a cost bill, in a motion for taxation or retaxation of costs, or in a motion under F.R.Civ.P. 50(b), 52(b), or 59.

(2) The motion shall be filed with the Clerk of Court and, in accordance with Rule 5, Federal Rules of Civil Procedure, shall be served upon the parties against whom the award is sought at least 10 days prior to the expiration of the time within which such opposing parties can file a timely notice of appeal from the judgment under Rule 4(a)(1, 3-6), Federal Rules of Appellate Procedure.

(3) The motion shall specify the judgment and the statute or other grounds on the basis of which entitlement to the award is claimed and shall state the amount (or provide a fair estimate of the approximate amount) of the fees and expenses sought. Within 30 days (or such other period as the Court may prescribe) after filing the motion, the movant shall file and serve a detailed specification and itemization of the requested award, with appropriate affidavits and other supporting documentation.

(4) Hearings on the motion shall be conducted by the Court in accordance with F.R.Civ.P. 43(e) and F.R.Civ.P. 78 and in accordance with applicable statutory and decisional standards and principles.

(5) Pendency of a motion filed under this rule does not extend the time for appealing from, or for filing a motion under F.R.Civ.P. 50(b), 52(b), or 59 directed to the judgment giving rise to the claim for attorney's fees. The Court may, however, take the motion into consideration in ruling upon a motion for extension of time for appealing filed under F.R.A.P. 4(a)(5).

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Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER,
Plaintiff

v.

GARY D. ZWEIFEL,
Defendant

Civil Action
Number
1:86-CV-156-ODE

RESPONSE OF PLAINTIFF TO DEFENDANT'S MOTION FOR SANCTIONS

This suit was brought by Mr. Pelletier against an attorney, Mr. Zweifel, charging that Mr. Zweifel's actions in connection with a corporate dispute and subsequent litigation constituted various breaches of duty and of law. This Court granted summary judgment on the basis that, although most of the material allegations contained in the complaint had factual support, they did not amount to violations of the law.

Defendant claims that he is entitled to Rule 11 sanctions because (a) there was no factual basis for the allegations contained in the complaint and (b) the complaint

was filed for no proper purpose but, rather, for harassment of the defendant, Defendant's Memorandum, p. 27.[1] He is in error on both points and plaintiff should not be subject to any sanction.

Factual basis

First, it is clear that there *was* a factual basis for all of the material allegations of the complaint. Though the Court granted the defendant summary judgment, that ruling was based upon an application of the law to those facts, not on a failure to substantiate the allegations. Moreover, in the companion litigation which was filed in State Court of Fulton County, this defendant was *denied* summary judgment based upon essentially the same material facts and on the same discovery as was used in this case.[2]

The defendant will not reiterate here his enumeration of the facts and the evidence and testimony which supports each, but instead – in the interest of efficiency and conservation of space (not to mention trees and paper) – incorporates his "Memorandum in Response to Defendant's Motion for Summary Judgment" (filed September

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[1] The defendant does not claim that he is entitled to sanctions because the complaint advanced "a legal theory that has no reasonable chance of success under the state of the decisional or statutory law and that [could not] be advanced as a reasonable argument to reverse, modify or extend the law", Defendant's Memorandum, p. 26-27.

[2] The State Court litigation stated claims for relief which were different from those stated in this action, but they were based on the same actions of the defendant.

29, 1987) and his "Response to Defendant's Statement of Material Facts and Counter-Statement of Material Facts As To Which There Is, At Least, a Genuine Issue for Trial" (filed September 29, 1987). A review of these documents demonstrates that this lawsuit was *not* filed without a basis in fact; they show that there was an *abundance* of facts to support the allegations in the complaint. The Court simply disagreed with the plaintiff on certain inferences which might reasonably be drawn from certain of those facts and on the application of the law to those facts.

Whatever one's view of the wisdom of bringing this suit or of the ultimate merit of the claims, this suit did not contain the sort of outrageous, baseless allegations or unconsionable behavior at which Rule 11 was aimed. Cf. *Jorgenson v. County of Volusia*, 846 F.2d 1350 (11 Cir., 1988) (failure to cite adverse, known controlling precedent to court in application for TRO); *Collins v. Walden*, 834 F.2d 961 (11 Cir., 1987) (completely unsupported and unsupportable allegations of conspiracy to deprive divorce litigant of civil rights filed by attorneys who had reason to know of the impossibility of proof); *Rolleston v. Eldridge*, 848 F.2d 163 (11 Cir., 1988) (suit brought by attorney against Judge Eldridge of the Georgia Superior Court in the face of absolute judicial immunity, but sanctions *denied*).

As the Eleventh Circuit noted in *U.S. v. Milam*, 855 F.2d 739 (1988) (affirming imposition of sanctions for pursuing frivolous statute of limitations defense in action by Government to collect on federally insured student loans):

> . . . . Rule 11 sanctions were designed to "discourage dilatory or abusive tactics and help to

> streamline the litigation process by lessening frivolous claims or defenses." [Donaldson] at 1556 (citation omitted).

Here there were no "dilatory or abusive tactics" and the claim – based upon the breaches of duty owed by the defendant to the plaintiff – were well-founded in fact.

> Sanctions under rule 11 are meant to eliminate frivolity and harrassment, not attorney zealousness. . . . See also *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986).
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> *Jean v. Nelson*, 863 F.2d 759 (11 Cir., 1988).

"The rule should not be used to deter potentially controversial or unpopular suits. . . . The Advisory Committee Note specifies that the rule 'is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.' " *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11 Cir., 1987) (en banc). In this case we have had a determination by the State Court of Fulton County – on the same set of facts as was before this Court – that Mr. Zweifel owed Mr. Pelletier a duty and that, for purposes of summary judgment, it could not be said that Mr. Zweifel did not breach that duty. There was, therefore, a factual basis for this suit; only the legal theories upon which recovery could be had were at issue. Since the defendant is not claiming that sanctions should be awarded for the bringing of a legally frivolous claim,[3] his motion should be denied.

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[3] In fact, the claims in this Court were not legally frivolous since, for the most part, the claims withstood the defendant's motion to dismiss. See, Order of January 9, 1987.

Purpose of the suit

The defendant claims that this suit was filed to "harass" him. There is not one iota of evidence that such is the case. All that was being sought was monetary damages to make the plaintiff whole. No litigation tactics or strategies were employed which burdened the defendant unduly or cost him unwarranted time, trouble or expense. Neither the plaintiff nor his counsel ever attempted to publicize the allegations of the complaint or to otherwise embarrass the defendant. Plaintiff and his counsel cooperated with the defendant's counsel in coordinating discovery so that wasteful, duplicative discovery could be avoided. No relief was asked and no demand was made of the defendant that was in any way improper. There is no indication that the plaintiff was seeking any other than to be made whole and no such base motive can be imputed to him. Certainly, defendant's *ipse dixit* is an insufficient basis upon which to find an "improper purpose". Here, as in *Nesmith v. Martin Marietta Aerospace*, 833 F.2d 1489 (11 Cir., 1987), there is no evidence of any "improper purpose", so sanctions on that ground would by unwarranted.

CONCLUSION

Having prevailed in the State Court against a motion for summary judgment on the same facts as were alleged in the complaint in this action, and there being no evidence of improper motive in bringing this suit, the defendant's motion should be denied.

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